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Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

SAN FRANCISCO ETHICS COMMISSION
NOTICE OF SPECIAL COMMITTEE MEETING
May 19, 2015, 3:00 P.M.
and AGENDA
Room 421 City Hall
1 Dr. Carlton B. Goodlett Place, San Francisco

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PLEASE NOTE THAT THIS IS NOT A MEETING OF THE FULL COMMISSION AND THAT THIS IS NOT THE REGULAR TIME OR ROOM FOR ETHICS COMMISSION MEETINGS

The meeting is in lieu of the previously announced Interested Persons Meeting on the same topic.

I. **Call to order and roll call.**

II. **The San Francisco Ethics Commission is in the process of establishing a recruitment process to replace Executive Director John St. Croix who is leaving the Commission in August. The purpose of this meeting is to solicit input from the public regarding this process and the desired qualifications of the next Director. (Discussion and public comment)**

The Commission also welcomes written comments regarding the process, which can be sent via email to: ethics.commission@sfgov.org or by regular mail to San Francisco Ethics Commission, Attn: Paul Renne, 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102.

III. **Adjournment.**

There will be an opportunity for public comment on each agenda item.

Materials contained in the Commission packets for meetings are available for inspection and copying during regular office hours at the Ethics Commission, 25 Van Ness Avenue, Suite 220, at least 72 hours prior to meetings. Any materials distributed to members of the Ethics Commission within 72 hours of the meeting or after the agenda packet has been delivered to the members are available for public inspection at the Ethics Commission, 25 Van Ness Avenue, Suite 220, San Francisco, during normal office hours.
Cell phones, pagers and similar sound-producing electronic devices: The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. The Chair may order the removal from the meeting room of any person responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices.

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Language Access: Per the Language Access Ordinance (Chapter 91 of the San Francisco Administrative Code), Chinese, Spanish and or Filipino (Tagalog) interpreters will be available upon requests. Meeting Minutes may be translated, if requested, after they have been adopted by the Commission. Assistance in additional languages may be honored whenever possible. To request assistance with these services please contact at (415) 252-3100 or ethics.commission@sfgov.org at least 48 hours in advance of the hearing. Late requests will be honored if possible.

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Lobbyist Registration and Reporting Requirements: Individuals who influence or attempt to influence local policy or administrative action may be required by the San Francisco Lobbyist Ordinance (San Francisco Campaign and Governmental Conduct Code sections 2.100 – 2.160) to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102; telephone (415) 252-3100, fax (415) 252-3112; and website: www.sfgov.org/ethics.

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Minutes of the Special Committee of
The San Francisco Ethics Commission
May 19, 2015
Room 421, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

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I. Call to order and roll call.

Chairperson Renne called the meeting to order at 3:03 PM.

COMMITTEE MEMBERS PRESENT: Paul Renne, Chairperson; Brett Andrews, Vice-Chairperson.

STAFF PRESENT: Garrett Chatfield, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Andrew Shen, Deputy City Attorney (DCA).

OTHERS PRESENT: Bob Planthold; Larry Bush; David Pilpel; Eileen Hansen; Charles Marsteller; Andrew Sinn.

MATERIALS DISTRIBUTED:
- Department of Human Resources Job Description for Department Head I (#0961);
- Department of Human Resources Request for Proposal to recruitment firms.

II. Discussion regarding the hiring of a recruitment firm for the position of Executive Director of the San Francisco Ethics Commission.

Chair Renne introduced the purpose of the meeting, which was to discuss hiring a recruiter, and asked if there were any objections to the meeting being recorded. No members of the public present objected.

Chair Renne stated that after a recruiter is hired, additional interested persons meetings will be held to discuss what qualifications should be included in the job profile for Executive Director. Chair Renne also outlined the projected timeline for the hiring process, stating that he optimistically hoped to have a new Executive Director hired by September 2015.

Larry Bush and Bob Planthold both stated that the Commission should hire a recruiter with an understanding that the Commission's Executive Director is more than just a department manager.

Eileen Hansen stated that it is unlikely that the Commission will have the position filled by September 2015.

Chair Renne explained that the current Deputy Executive Director would become the Acting Executive Director until the position is filled. He stated that the current Deputy Executive

Director expressed his interest in applying for the Executive Director position, and thus will have no role in the recruitment and hiring process.

David Pilpel stated that the Commission does not need to spend a large amount of money to hire a recruiter for the Executive Director position because there are many sources for a candidate to find out about the open position. He stated that there are both advantages and disadvantages in hiring an individual currently involved with ethics laws. He stated that the Commission should consider hiring an individual who is willing to make at least a five to ten year commitment to the Commission.

Charles Marsteller and Eileen Hansen both expressed their views that appointing the current Deputy Executive Director as the Acting Executive Director could create an appearance of a conflict as he might make decisions that are not best for the Commission but would put him in a favorable light to be hired as the permanent Executive Director.

Eileen Hansen stated that she has accepted Executive Director positions at other organizations in the past on an "interim" basis with the understanding that she would not apply to be the permanent Executive Director. She stated that the Commission should consider that approach instead of having the current Deputy Executive Director become the Acting Executive Director after John St. Croix leaves the Commission in August.

Eileen Hansen stated that there are other Ethics Commissions in the country that are more proactive than the San Francisco Ethics Commission and that any recruiter that is hired should solicit applications from those organization. She stated that the local advocacy group "Friends of Ethics" would also know of qualified individuals.

Vice-Chair Andrews stated that he is an Executive Director for a non-profit and understands that the Ethics Commission's Executive Director is more than just a manager, and that the Commission will consider that factor when looking at applicants.

III. Adjournment.

The meeting adjourned at 4:09 PM.

Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

SAN FRANCISCO ETHICS COMMISSION
NOTICE OF SPECIAL MEETING
May 27, 2015, 5:30 P.M.
and AGENDA
Room 416 City Hall
1 Dr. Carlton B. Goodlett Place, San Francisco

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NOTICE: This is not the Commission's regular meeting place or date.

I. Call to order and roll call.

II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.

III. Discussion and possible action on a matter submitted under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance. (Attachments: Memos to the Commission, Hearing Notice, Staff Report and Recommendation and Attachments; Response from Complainant; Response from Respondent; Letter from the City Attorney; Letters from David Pilpel; Letter from Paula Datesh.)

a) Ethics Complaint No. 03-150127, hearing regarding alleged violation of the Sunshine Ordinance.
Complainant: Paula Datesh
Respondent: Rebekah Krell, Arts Commission Deputy Director

IV. Discussion and possible action on Executive Director recruitment process. (Attachment: Recruitment Proposal.)

V. Discussion and possible action on Commissioner Keane's "Report on Recommendations for Both a Rewrite of The Language of Proposition J and For a Restoration of the Commission's Oversight of 'Expenditure Lobbying' in Ballot Measures for Upcoming Elections." (Attachments: Commissioner Keane's Report; Proposed Draft of Amendments to Lobbying Ordinance.)

VI. Discussion and possible action regarding complaints received or initiated by the Ethics Commission concerning: (1) California Government Code section 84104 and San Francisco Campaign and Governmental Conduct Code section 1.109(a) (failure to maintain required committee records), California Government Code section 84300(b) (making cash expenditures), and San Francisco Campaign and Governmental Conduct Code sections 1.114(a) (exceeding contribution limits); and

(2) San Francisco Campaign and Governmental Conduct Code section 2.110(c) (failure to disclose lobbying contacts). Possible Closed Session.

a. Public comment on all matters pertaining to Agenda Item VI, including whether to meet in closed session.

b. Vote on whether to assert attorney-client privilege and meet in closed session under Charter section C3.699-13, Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss anticipated litigation as plaintiff. (Action.)

c. Conference with Legal Counsel: Anticipated litigation as plaintiff. (Discussion and possible action.)

Number of possible cases: 2

d. If closed session is held, reconvene in open session.

e. Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding anticipated litigation as plaintiff. (Discussion and possible action.)

Motion: The Ethics Commission moves (not) to disclose its closed session deliberations re: anticipated litigation.

VII. Discussion and possible action on the Commission's April 27, 2015 draft meeting minutes. (Attachment: April 27, 2015 draft minutes.)

VIII. Discussion of Executive Director's Report. An update of important Ethics Commission staff activities since the previous monthly meeting. The written report, which is available at the Commission office and on its website, covers the investigation and enforcement program, revenues, campaign finance disclosure program, revenues, public financing/campaign finance audit program, lobbyist program, campaign consultant program, and outreach and education. Any of these subjects may potentially be part of the Director's presentation or discussed by the Commission. (Attachment: Executive Director's Report.)

IX. Items for future meetings. Commissioners may propose items for future agendas and the Commission may determine the priority of these items. (Discussion.)

X. Adjournment.

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ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

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CHAIRPERSON

BRETT ANDREWS
VICE-CHAIRPERSON

BEVERLY HAYON
COMMISSIONER

BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: May 19, 2015

To: Members, Ethics Commission

From: Jesse Mainardi, Deputy Executive Director

Re: **Continuance of Hearing – Ethics Complaint 03-150127**

This matter concerns an allegation by Paula Datesh that Rebekah Krell, the Deputy Director of the Arts Commission, violated the Sunshine Ordinance when responding to a document request by Mr. Datesh. It was heard by the Commission on April 27, 2015, and the Commission continued the matter to May 27, 2015.

At the April meeting, the Commission decided to consider the merits of the matter, even though Ms Datesh's failure to comply with Commission regulations made her complaint subject to dismissal. The Commission determined that Ms. Krell committed a non-willful violation of the Sunshine Ordinance, section 67.27(a), by failing to cite a specific exemption to justify the non-disclosure of a public record.

The Commission did not determine whether the record at issue (an email) was properly withheld. Instead, the Commission determined that it needed to review the withheld record in order decide if the privilege to withhold the record had been waived by Ms. Krell. More specifically, the Commission stated that it needed the email to resolve conflicting testimony from the parties as to whether Ms. Krell read the contents of the withheld record to Ms. Datesh.

The withheld record was provided to Commissioners for in camera review pursuant to procedures set forth by the City Attorney's Office.[1] However, staff understands that Ms. Datesh will likely not attend the continued hearing on May 27, 2015. Ms. Datesh has nevertheless requested that the Commission still hear the matter despite her absence. Ms. Krell also stated that she wished the matter to be heard.

In this regard, the Commission may wish to decide the following issues:

1. Did Ms. Krell waive the exemptions contained in Evidence Code, sections 1040 and 1041 for confidential information?

---

[1] The withheld record was not provided to Commissioner Keane who recused himself from this matter.

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2. Does Sunshine Ordinance, section 67.24(i), prohibit a City department from withholding records based on the exemptions contained in Evidence Code, sections 1040 and 1041 for confidential information?

Documents first provided to the Commission in connection with this matter for the April 27, 2015 meeting are attached. Also attached are documents received from Ms. Datesh and from David Pilpel after the April hearing.

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

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CHAIRPERSON

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COMMISSIONER

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COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: April 21, 2015

To: Members, Ethics Commission

From: John St. Croix, Executive Director

Re: **Hearing – Ethics Complaint 03-150127**

This complaint will be heard under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance ("Regulations"). Staff has scheduled this matter to be heard during the next regular Ethics Commission meeting at **5:30 PM on Monday, April 27, 2015**, in **Room 400** in City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

Both Ms. Datesh ("Complainant") and Ms. Krell ("Respondent") were issued the Report and Recommendation and were noticed of the hearing by e-mail and US Mail/Interoffice Mail on April 8, 2015. Both the Complainant and the Respondent have submitted a response to the Report and Recommendation, all of which are attached. In addition, the Office of the City Attorney submitted a letter to the Commission "to provide advice on an issue of general importance to City government." Staff has included that letter with the packet.

Neither the Complainant nor the Respondent are required to attend the hearing. However, if any party fails to appear, and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence. At the hearing, the Complainant and the Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing.

In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance.

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PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: April 8, 2015

To: Rebekah Krell, Deputy Director and CFO, Arts Commission, Respondent
Paula Datesh, Complainant

From: John St. Croix, Executive Director

Re: **NOTICE – Hearing – Ethics Complaint 03-150127**

The above referenced complaint will be heard under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance ("Regulations"). Staff has scheduled this matter to be heard during the next regular Ethics Commission meeting at **5:30 PM on Monday, April 27, 2015**, in Room 400 in City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

Neither the Complainant nor the Respondent are required to attend. However, if any party fails to appear, and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence. The Complainant or the Respondent must request any continuance of the hearing date in writing. The request must be delivered to the Commission Chairperson, and to all other parties, no later than ten business days before the date of the hearing, or no later than Monday, April 13, 2015.

Under Chapter Three of the Regulations, the Executive Director shall prepare a written Report and Recommendation summarizing his or her factual and legal findings. The Report and Recommendation and all accompanying documents are enclosed.

The Complainant and Respondent may each submit a written response to the Director's Report and Recommendation. The response may contain legal arguments, a summary of evidence, and any mitigating or aggravating information. In support of the response, the Complainant and Respondent may each submit evidence through declaration. If the Complainant or Respondent submits a response, he or she must deliver the response to the Commission, and to all other parties, no later than five business days prior to the date of the hearing, or no later than Monday, April 20, 2015. Any response may not exceed 10 pages, double-spaced, excluding attachments. The Complainant or Respondent must deliver eight copies of the response, or may send the response as an email attachment, to the Executive Director.

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The Complainant and the Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing.

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Chatfield, Garrett (ETH)

From: Chatfield, Garrett (ETH)
Sent: Wednesday, April 08, 2015 8:12 AM
To: 'atreboux@aol.com'; Krell, Rebekah (ART)
Subject: Report and Recommendation Ethics Complaint 03-150127
Attachments: Hearing.Packet.0315.pdf

Please find attached the Notice of Hearing and the Report and Recommendation for the above referenced matter.

A hard copy will also be sent.

Thank you,

Garrett Chatfield
San Francisco Ethics Commission
City and County of San Francisco
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102
(P) 415.252.3100/(F) 415.252.3124
garrett.chatfield@sfgov.org
http://www.sfethics.org

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CITY AND COUNTY OF SAN FRANCISCO

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BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: April 8, 2015

To: Members, Ethics Commission

Cc: Rebekah Krell, Deputy Director and CFO, Arts Commission, Respondent
Paula Datesh, Complainant

From: John St. Croix, Executive Director M for JSC

Re: **REPORT AND RECOMMENDATION**
ETHICS COMMISSION COMPLAINT NO. 03-150127

INTRODUCTION AND JURISDICTION

This report and recommendation has been prepared pursuant to Chapter Three of the Ethics Commission's Regulations for Handling Violations of the Sunshine Ordinance ("Regulations") with regard to a complaint filed by Ms. Paula Datesh on January 22, 2015, alleging a violation of the Sunshine Ordinance by Arts Commission Deputy Director Rebekah Krell.

The Regulations indicate that the Commission shall handle: (1) complaints alleging Sunshine Ordinance violations by elected officials and department heads: (2) complaints regarding public records requests if the District Attorney and/or Attorney General have taken no action after being notified of a failure to produce those records; and (3) staff initiated complaints concerning the Sunshine Ordinance. (Regulations, Chapter 3, Section I.A., copy attached.) The allegation discussed herein involves an Arts Commission employee and, because staff is aware that the Complainant did not

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notify the District Attorney and/or Attorney General of Respondent's alleged failure to comply with the Sunshine Ordinance, staff understands that the Commission may dismiss this complaint without considering its merit. Nevertheless, staff has analyzed the allegations should the Commission wish to consider the merits of this matter.[1]

Under the Regulations, the Commission must make a determination on alleged violations of the Ordinance that it will consider at a hearing in open session. The Commission is not bound by the Executive Director's recommendations contained herein.[2]

SUMMARY OF APPLICABLE LAW

Ordinance, section 67.21(b), provides in relevant part, that a "custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request."

Ordinance, section 67.24(i), provides in relevant part, that an exemption from disclosure may not be "based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of [the Ordinance] ... or ... [of the] California Public Records Act that is not forbidden by this ordinance."

Ordinance, section 67.25, provides in relevant part, that a "[n]otwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, a written request for information described in any category of non-exempt public information

[1] Staff also notes that the Commission's complaint form did not accurately reflect the above rule at the time Ms. Datesh submitted her complaint.

[2] The investigation of this complaint exceeded the required 30-day time period because Ms. Datesh made three complaints against various Arts Commission employees on January 22, 2015, and two additional complaints against Arts Commission employees on February 15, 2015. (*See* Regulations, Ch. 3, § II.A.) Staff commenced its investigation into all of the complaints, but on March 10, 2015, Ms. Datesh withdrew all of her allegations except for the one presented in this Report and Recommendation. Thus, complaint numbers 02-150127 and 04-150127 were closed.

shall be satisfied no later than the close of business on the day following the day of the request. . . [so long as] the words 'Immediate Disclosure Request' are placed across the top of the request and on the envelope, subject line, or cover sheet in which the request is transmitted."

Ordinance, section 67.27(a), provides that a withholding of records shall be justified in writing by citing either a specific permissive exemption in the California Public Records Act, provided that the exemption is not forbidden to be asserted by the Ordinance.

California Evidence Code, sections 1040(b)(2) and 1041(a)(2) (attached), permit a public entity to withhold information obtained in confidence, including the identity of an informant, if it is against the public interest because there is a necessity for preserving the confidentiality of that information that outweighs the necessity for disclosure in the interest of justice.

California Government Code, section 6254(k), incorporates the privileges contained within Evidence Code sections 1040(b)(2) and 1041(a)(2), into the Public Records Act ("PRA").

PRA, section 6255, states that an agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of the PRA or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

ALLEGATION

Ms. Datesh alleges that Respondent Krell failed to produce public records.

EVIDENCE CONSIDERED AND FACTUAL FINDINGS

Staff's investigation in this matter included an interview with Ms. Datesh and Mr. Krell, and a review of the records request and response, each of which is attached to this Report and Recommendation. Two Commission investigators also reviewed the email at issue on site at the Arts Commission. From its investigation, staff made the following factual findings.

On January 16, 2015, Ms. Datesh[3] made an Immediate Disclosure Request ("IDR") to Ms. Krell requesting "all emails regarding an inspection Howard Lazar made on Market between 4-5th Street on Friday 2, 2015 [sic]." On January 20, 2015, Ms. Krell responded stating that "[d]ue to the necessity, and our right, to maintain confidentiality in the course of an investigation, we have no documents responsive to your request."[4] Ms. Krell later told staff that an email record does exist that was responsive to the records request, but that it was related to an investigation of a complaint against Ms. Datesh, who is an artist participating in the Street Artists Program. She stated that the email was withheld to keep the complainant's name and identifying information confidential, and that the City Attorney's Office has long advised the Arts Commission that confidential information related to such investigations may be withheld to maintain an informant's confidentiality. She also stated that the content of the email contained information that would identify the complainant and could not be redacted to separate confidential from non-confidential information, thus the entire email was withheld.

LEGAL FINDINGS

Ms. Krell provided a reason for withholding the email in her response to Ms. Datesh, and she stated to staff that she believed citing "confidentiality" met the requirement of Ordinance, section 67.27(a). However, Ordinance, section 67.27(a), requires a citation to a specific permissive exemption in the PRA that allows for the withholding. In this case, based on Ms. Krell's statements to staff, PRA section 6254(k), is the specific permissive exemption that should have been cited. Because Ms. Krell did not provide the citation to a specific permissive

[3] Ms. Datesh is also known as Ann Treboux.

[4] Ms. Datesh made her request as an IDR, pursuant to Ordinance, section 67.25, which requires a response to a public records request by the close of business the day following the day of the request. January 16, 2015, was a Friday and all City offices were closed on Monday, January 19, 2015, for a public holiday. Thus, Ms. Krell timely responded by the next business day.

exemption, she committed a violation of Ordinance, section 67.27(a). However, it does not appear that the violation was willful.

On a related issue, Ms. Krell stated to staff that the Arts Commission routinely conducts investigations of complaints, and that in this case the Arts Commission determined that the necessity in keeping the complainant's information confidential outweighed the necessity for disclosure in the interests of justice. Staff reviewed the email at issue and concluded that the content of the email contained information that would have revealed the identity of the complainant if it were not redacted in its entirety.

The Arts Commission withheld the email based on the standing advice of its Deputy City Attorney, relying on two privileges contained within the California Evidence Code, incorporated into the PRA through the specific exemption of PRA, section 6254(k). The first, California Evidence Code, section 1040(b)(2), allows a public entity to withhold information acquired in confidence if disclosure is "against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure *in the interest of justice*." (Emphasis added.)

The second, California Evidence Code, section 1041(a)(2), similarly allows a public entity to refuse to disclose the identity of a complainant if disclosure is "against the public interest because the necessity for preserving the confidentiality of his or her identity outweighs the necessity for disclosure *in the interest of justice*" (emphasis added), and the information is furnished in confidence to an administrative agency charged with the administration or enforcement of law alleged to be violated.

Although Ordinance, section 67.24(i), allows for a withholding based on an exemption provided for by the California PRA, that same section also prohibits City agencies from asserting

an exemption for withholding any document or information based on a finding or showing that "the public interest in withholding the information outweighs the public interest in disclosure." (*See* Ord. § 67.24(i).) Ordinance, section 67.24(i), appears to allow for the use of a public records exemption, so long as City agencies refrain from using either the general balancing test specifically set forth in PRA, section 6255, or any other PRA exemption that relies on the same balancing test.

Even if Ordinance, section 67.24(i), is read to prohibit the use of any specific PRA exemption that incorporates the general balancing test, it is not entirely clear whether Ordinance, section 67.24(i), prohibits withholding records based on the exemptions in California Evidence Code, sections 1040(b)(2) and 1041(a)(2). The balancing test language of the two Evidence Code sections differs from the balancing test language referenced in Ordinance, section 67.24(i) and PRA, section 6255 (e.g., the balancing tests in the Evidence Code sections specifically reference "the interest of justice," whereas the other balancing tests do not). If Ordinance, section 64.24(i), is read to prohibit only the general balancing test provided for by PRA, section 6255, while allowing for reliance on a specific permissive exemption that incorporates a similar, but not identical balancing test, then the Arts Commission properly applied the Evidence Code provisions and properly withheld the email at issue.

However, if the Commission determines that Ordinance, section 67.24(i), prohibits the reliance on any exemption that incorporates any balancing test, then regardless of the proper application of Evidence Code, sections 1040 and 1041, the Arts Commission would likely be prohibited from relying on those Evidence Code sections to withhold the email. The California Supreme Court has stated that "section 1040 involves a balancing test *similar to* that required by section 6255" and that "[t]he weighing process mandated by Evidence Code section 1040

requires review of the *same elements* that must be considered under section 6255." (*See ACLU v. Deukmejian* (1982) 32 Cal. 3d 440, 446 n. 6; *CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 656; emphases added.) Thus, "rejection of the claim of exemption under section 6255 on the ground that the public interest weighs in favor of disclosure similarly requires rejection of the claims of exemption under . . . Evidence Code section 1040." (*CBS, Inc.*, *supra*, 42 Cal.3d at 656.)

On balance, it seems that the Supreme Court's language likely suggests that Ordinance, section 67.24(i), prohibits reliance on the balancing tests found in California Evidence Code, sections 1040(b)(2) and 1041(a)(2), given their similarity to the balancing test found in PRA, section 6255. Considering the language from the Supreme Court and that the Ordinance must be broadly interpreted, it appears that the Arts Commission may have been prohibited from withholding the requested record, and by doing so committed a violation of Ordinance, section 67.21(b), because the record that was withheld would not be exempt under the Ordinance.

However, it does not appear that any violation was willful given the Arts Commission's reliance on advice from the City Attorney's office, the ambiguity of Ordinance, section 67.24(i), and that there has been no prior determination regarding the applicability of that section.

RECOMMENDATION

Based on the above reasons, staff recommends that the Commission find that: (1) Ms. Krell and/or the Arts Commission committed a *non-willful* violation of Ordinance, section 67.27(a), by failing to provide the required justification for the withholding of a public record; and (2) Ms. Krell and/or the Arts Commission committed a *non-willful* violation of Ordinance, section 67.21(b), by withholding a public record.

Ethics Complaint Number 03-150127

Supporting Documents to the Report and Recommendation

San Francisco
Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

FILED
2015 JAN 22 AM 9:44
SAN FRANCISCO
ETHICS COMMISSION
BY

San Francisco Ethics Commission
Complaint Form

Please type or print legibly, and attach additional pages if necessary.

Complainant Information*

Name of Complainant	PAULA DATESH
Address	150 SUTTER ST. #738
Zip	SF, CA 94104
Home Phone	516-254-5938
Work Phone	qtrekbook (@) aol.com

** If you wish to remain anonymous, do not complete this section or the verification below.*

Respondent Information

Name of Respondent	REBEKAH KRELL
Business Title	CEO
City Department	ARTS COMMISSION
Business Address	25 VAN NESS AVE #302
Work Phone	415-252-4665

☒ *If more space is needed to list additional complainants or respondents, please check this box and attach additional sheets as necessary.*

Type of Allegation(s)

Check the appropriate box(es) below indicating the type of allegation(s) stated in this complaint.

- ☐ Campaign Finance Reform Ordinance
- ☐ Campaign Consultant Ordinance
- ☐ Lobbyist Ordinance
- ☐ Sunshine Ordinance (The Ethics Commission can only investigate alleged violations of the Sunshine Ordinance if: 1) you notified the Respondent of the alleged violation at least 40 days before filing a complaint with the Ethics Commission; and 2) the Respondent did not cure the alleged violation).
- ☐ Multiple Campaign Accounts
- ☐ False Endorsements on Campaign Literature
- ☐ Political Activity by City Officers and Employees
- ☐ Acceptance of Gifts, Contributions and Future Employment by Public Officials Who Approve Contracts and Other Public Benefits
- ☐ Contracts Between Members of Boards and Commissions and the City
- ☐ Dual Officeholding for Compensation
- ☐ City Officers Representing Private Parties Before City Boards and Commissions
- ☐ Intimidation or Retaliation by a City Officer or Employee Against Persons Who File Complaints with the Ethics Commission
- ☐ Financial Conflicts of Interest by City Officers and Employees
- ☐ Payment for Appointment to City Service or Employment
- ☐ Disclosure of Confidential Information by City Officers and Employees
- ☐ City Officer or Employee Appearing Before Former Board or Agency
- ☐ Private Compensation of City Officers and Employees for City Service
- ☐ City Officers or Employees Voting on Own Character or Conduct
- ☐ Decisions Involving Family Members
- ☐ Disclosure of Personal, Business or Professional Relationships
- ☐ Referrals
- ☐ Other** _____

** *Complaints that allege that a City officer or employee engaged in some form of misconduct that is not within the Commission's authority to resolve will be forwarded to the appropriate agency for review and possible enforcement.*

Description of Facts

Provide a specific description of the facts constituting the violation(s), including any relevant dates. Attach additional sheets as necessary.

SENT AN EMAIL IDEA ON JAN. 14, 2015.
I HAVE NOT RECIEVED A RESPONSE.
SPOKE WITH KRELL BY PHONE ON JAN. 6.
SHE SAID SHE HAD AN EMAIL RELATIVE
TO THE INCIDENT ON JAN-2 BUT REFUSED TO SEND IT

Witnesses

Provide the following information about person(s) you believe may have information that would assist the Commission in its evaluation of this complaint.

Name of Witness	
Address	
Phone	
Information you believe this person can provide to support the allegations stated in this complaint	

Name of Witness	
Address	
Phone	
Information you believe this person can provide to support the allegations stated in this complaint	

☐ *If more space is needed to list additional witnesses, please check this box and attach additional sheets as necessary.*

Documentation

Attach copies of any documents in your possession that relate to the allegations stated in this complaint. In addition, indicate below whether there are other records, not in your possession, that you believe may assist the Commission in its evaluation of this complaint.

1 PAGE OF 1 ATTACHED.

ON JAN. 21 - I GOT A LETTER FROM HOWARD HAZER DATED JAN. 5. IT WAS SENT 1ST CLASS MAIL. IT IS A NOTICE OF WARNING. HE CITES AN INSPECTION ON JAN 2, 2015. HE CLAIMS I IMPEDED INTERFERED W/ A STATE PERSON. AND DID NOT MAKE THE ITEMS I SOLD.

Additional Information

HE INCLUDES 2 PHOTOS. 1 OF ME BEHIND MY STAND TAKING A PHOTO OF HIM. 1 OF ⇒

Provide any additional information that you believe may assist the Ethics Commission in its evaluation of this complaint.

SEE ATTACHED 2 PAGES.

Related Complaints

Have you made the same or similar allegations to another agency or court? Yes ☐ No ☒

If yes, identify the agency or court and attach a copy of any complaint or other written description of the allegations submitted to that agency or court.

Verification***

I certify under penalty of perjury under the laws of the State of California that the above statements are true and correct.

Executed: 1/22/2015 (Date)	At: 25 VAN NESS SAN FRANCISCO, CA (City and State)
By: PAUL DATEH (Typed or printed name)	(Signature)

**** Complaints need not be verified. Complainants who wish to remain anonymous should not complete the verification section above. However, please be advised that the Commission is not required to process or respond to unverified complaints.*

Additional information to the unanswered Immediate Disclosure Request sent by email to Rebekah Krell on Jan. 16, 2015:

On Jan. 21-I received a letter from the SFAC and signed by Howard Lazar on Jan. 5. It is a, "*Notice of Violation Warning*". He cites an inspection done on Jan. 2 and claims 2 allegations-*interfering with a staff person and not making the items I sell.* He includes an excerpt of a logbook from Jan.2. These are Howard Lazar notes as he walked around the downtown area alone. In a previously unanswered IDR sent to Krell-I asked for a copy of all impections done in the downtown area for the month or December 2014. That IDR was unanswered.

Lazar included 2 photos. 1 was me behind my stand taking a photo of him. Another was a blurred photo of earrings. He claims the earring's shown in the photo do not have 3 beads on them and therefore do not conform to the Ordinance. The photo does show each pair of earrings having 3 beads. He does not cite the Ordinance or cite a section. He then rants about how he knows they are commercially manufactured pendants. They are not commercially manufactured pendants.

The 2nd photo does not show I interfered with the duties of a staff person. Every time, Lazar does his inspection he walks alone and I tape him as he approaches my stand. He was there for over 45 minutes angry photographing; walking around my stand and at one point picked up a panel of earrings. He went to the next stand and whispered something into Ms. Yeungs ear. I have the tape and it is avaible upon request.

After this incident, I packed up and went to city hall. I was advised by Ajia Stevens of the Civil Grand Jury Office to file a police report. She looked at the tape. She gave me paperwork and said to file a complaint with the Department of Human Resources. On my way over there, I stopped at the SFAC Offices. Krell came out and said she did not want to look at the tape and to make an appointment. She said she would question Lazar the following Monday and send me an email. I did not receive one and called on Tuesday. She claimed to have an eye witness to the incident.

Krell cited an email sent to her by Lazar. She said it was from the stand next to me. I asked her to send it. She refused. I explained that I would send her an email IDR to ask for the information. I did and she did not respond.

I spoke to DCA Adine Varah by phone yesterday. I explained all of this. Last week, I spoke to Derek Moore-an investigator with the City Attorney's Office. Yesterday, I showed the letter sent to me by Howard Lazar to Cynthia Goldstein of the Board of Permits and Appeals.

The general opinion is the the letter sent to me by Lazar is vague. He starts out in the first person and changes to the third person. He does not cite the Ordinance or section violated; does not give a time frame to respond but says to respond to the program director. I have not responded.

Note: At the Street Artist meeting in January 2015 held in the basement of 25 Van Ness- Howard Lazar interrupted my general public comment by making a comment that, "I do not make what I sell and these items can be found in Chinatown". This is a violation of Chapter 67 of the Sunshine Ordinance.
Item #2-the Directors report was tabled without a vote by the Commissioners. This is a violation of the Brown Act and Sunshine Ordinance. This is in the audio which is posted on-line.

Should you require additional information-please contact me.

From: atreboux <atreboux@aol.com>
To: Krell, Rebekah (ART) (ART) <rebekah.krell@sfgov.org>
Subject: Fw: Immediate Disclosure Request
Date: Fri, Jan 16, 2015 4:05 pm

Subject: Immediate Disclosure Request

Request all emails regarding an inspection Howard Lazar made on Market between 4-5th Streets on Friday 2, 2015. You said you would send an email to me on January 5, 2015 after speaking with Lazar. You did not. when I was able to get you on the phone today, you cited an email that was sent by someone about this incident. it was forwarded to you by Howard Lazar. I request a copy of that email.

I am making this request pursuant to the Sunshine Ordinance.

Ann Treboux
atreboux@aol.com

Chatfield, Garrett (ETH)

From: Krell, Rebekah (ART)
Sent: Friday, February 13, 2015 4:16 PM
To: Chatfield, Garrett (ETH)
Subject: FW: Immediate Disclosure Request

Importance: High

Rebekah Krell
Deputy Director & CFO

San Francisco Arts Commission
25 Van Ness Avenue, Suite 345
San Francisco, CA 94102
T: 415-252-4665 F: 415-252-2595
sfartscommission.org

e-Newsletter | Twitter | Facebook | YouTube | Flickr

From: <Krell>, Rebekah <rebekah.krell@sfgov.org>
Date: Tuesday, January 20, 2015 4:19 PM
To: "atreboux@aol.com" <atreboux@aol.com>
Subject: Re: Immediate Disclosure Request

Ms. Treboux,

Due to the necessity, and our right, to maintain confidentiality in the course of an investigation, we have no documents responsive to your request.

Please note that today, Tuesday, January 20, is the next business day after Friday, January 16, when your request was sent and received. Yesterday, Monday, January 19, our offices were closed in observance of Martin Luther King Jr. Day.

Best,

Rebekah

Rebekah Krell
Deputy Director & CFO

San Francisco Arts Commission
25 Van Ness Avenue, Suite 345
San Francisco, CA 94102
T: 415-252-4665 F: 415-252-2595
sfartscommission.org

e-Newsletter | Twitter | Facebook | YouTube | Flickr

From: "atreboux@aol.com" <atreboux@aol.com>
Date: Friday, January 16, 2015 3:14 PM
To: Rebekah <rebekah.krell@sfgov.org>
Subject: Fw: Immediate Disclosure Request

Subject: Immediate Disclosure Request

Request all emails regarding an inspection Howard Lazar made on Market between 4-5th Streets on Friday 2, 2015. You said you would send an email to me on January 5, 2015 after speaking with Lazar. You did not. when I was able to get you on the phone today, you cited an email that was sent by someone about this incident. it was forwarded to you by Howard Lazar. I request a copy of that email.

I am making this request pursuant to the Sunshine Ordinance.

Ann Treboux
atreboux@aol.com

MARCH 10, 2015

FILED
2015 MAR 10 PM 2:04
SAN FRANCISCO
ETHICS COMMISSION

TO THE ETHICS COMMISSION:

I MADE 5 COMPLAINTS. 3 ON JAN. 22, 2015 AND 2 ON FEB. 10, 2015 AGAINST VARIOUS OF THIS COMMISSION EMPLOYEES.

I WANT TO WITHDRAW ALL ALLEGATIONS EXCEPT I AGAINST REBEKAH KRELL FOR FAILING TO JUSTIFY WITH HOLDING OF A PUBLIC RECORD. THIS ALLEGATION WAS ASSIGNED COMPLAINT # 03-150127

SINCERELY,

PAULA DATESH

EVIDENCE CODE - EVID

DIVISION 8. PRIVILEGES [900 - 1070] *(Division 8 enacted by Stats. 1965, Ch. 299.)*

CHAPTER 4. Particular Privileges [930 - 1063] *(Chapter 4 enacted by Stats. 1965, Ch. 299.)*

ARTICLE 9. Official Information and Identity of Informer [1040 - 1047] *(Article 9 enacted by Stats. 1965, Ch. 299.)*

1040. (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(c) Notwithstanding any other provision of law, the Employment Development Department shall disclose to law enforcement agencies, in accordance with the provisions of subdivision (k) of Section 1095 and subdivision (b) of Section 2714 of the Unemployment Insurance Code, information in its possession relating to any person if an arrest warrant has been issued for the person for commission of a felony.

(Amended by Stats. 1984, Ch. 1127, Sec. 2.)

1041. (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing the person's identity, if the privilege is claimed by a person authorized by the public entity to do so and either of the following apply:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state.

(2) Disclosure of the identity of the informer is against the public interest because the necessity for preserving the confidentiality of his or her identity outweighs the necessity for disclosure in the interest of justice. The privilege shall not be claimed under this paragraph if a person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding shall not be considered.

(b) The privilege described in this section applies only if the information is furnished in confidence by the informer to any of the following:

(1) A law enforcement officer.

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated.

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2). As used in this paragraph, "person" includes a volunteer or employee of a crime stopper organization.

(c) The privilege described in this section shall not be construed to prevent the informer from disclosing his or her identity.

(d) As used in this section, "crime stopper organization" means a private, nonprofit organization that accepts and

expends donations used to reward persons who report to the organization information concerning alleged criminal activity, and forwards the information to the appropriate law enforcement agency.

(Amended by Stats. 2013, Ch. 19, Sec. 1. Effective January 1, 2014.)

1042. (a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

(c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.

(d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

(Amended by Stats. 1969, Ch. 1412.)

1043. (a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

(2) A description of the type of records or information sought.

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

(Amended by Stats. 2002, Ch. 391, Sec. 1. Effective January 1, 2003.)

1044. Nothing in this article shall be construed to affect the right of access to records of medical or psychological history where such access would otherwise be available under Section 996 or 1016.

(Added by Stats. 1978, Ch. 630.)

1045. (a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance, the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

(Amended by Stats. 2002, Ch. 391, Sec. 2. Effective January 1, 2003.)

1046. In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility.

(Amended by Stats. 2002, Ch. 391, Sec. 3. Effective January 1, 2003.)

1047. Records of peace officers or custodial officers, as defined in Section 831.5 of the Penal Code, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure.

(Amended by Stats. 2002, Ch. 391, Sec. 4. Effective January 1, 2003.)

San Francisco
Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

ETHICS COMMISSION REGULATIONS FOR HANDLING VIOLATIONS OF THE SUNSHINE ORDINANCE

Effective Date: January 25, 2013
Includes amendments effective November 22, 2013

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CHAPTER ONE

I. PREAMBLE

Pursuant to San Francisco Charter, section 15.102, the San Francisco Ethics Commission promulgates these Regulations in order to ensure compliance with the San Francisco Sunshine Ordinance, San Francisco Administration Code, section 67.1, et seq. These Regulations shall apply to complaints alleging violations of the Sunshine Ordinance. All complaints alleging violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other governmental ethics laws shall be handled separately under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

A. "Brown Act" means California Government Code section 54950, et seq.

B. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.

C. "California Public Records Act" means California Government Code section 6250, et seq.

D. "City" means the City and County of San Francisco.

E. "City officer" means any officer identified in San Francisco Administrative Code Section 1.50, as well as any City body composed entirely of such officers.

F. "Commission" means the Ethics Commission.

G. "Complaint" means a Task Force referral or a referral from the Supervisor of Records, a written document submitted directly to the Ethics Commission alleging a violation of the Sunshine Ordinance, or a matter initiated by Ethics Commission staff alleging a violation of the Sunshine Ordinance.

H. "Complainant" means a person or entity that initiated a matter with the Task Force, Supervisor of Records, or Commission alleging a violation of the Sunshine Ordinance. "Complainant" shall also mean the Commission if the matter was initiated by Commission staff.

I. "Custodian" means a City officer or employee having custody of any public record.

J. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.

K. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity. The Commission, the Executive Director, the Task Force, a Respondent, or the Complainant receiving material may consent to any other means of delivery, including delivery by e-mail or fax. In any proceeding, the Commission Chairperson may order that the delivery of briefs or other materials be accomplished by e-mail.

L. "Elected official" shall mean the Mayor, a Member of the Board of Supervisors, City Attorney, District Attorney, Treasurer, Sheriff, Assessor, Public Defender, a Member of the Board of Education of the San Francisco Unified School District, and a Member of the Governing Board of the San Francisco Community College District.

M. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.

N. "Exculpatory information" means information tending to show that the Respondent has not committed the alleged violation(s).

O. "Order of Determination" means: 1) an order from the Task Force that forms the basis of a show cause hearing for Task Force referrals made under Sunshine Ordinance section 67.30(c); or 2) a final recommendation issued by the Task Force, made pursuant to Sunshine Ordinance section 67.34, that a willful violation of the Sunshine Ordinance by an elected official or department head occurred.

P. "Public Records" means records as defined in section 6252(e) of the California Public Records Act, which includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics, and/or Sunshine Ordinance section 67.20(b).

Q. "Referral" means a document from the Task Force or Supervisor of Records to the Commission finding a violation of the Sunshine Ordinance.

R. "Respondent" means a City officer or City employee who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance.

S. "Sunshine Ordinance" means San Francisco Administrative Code section 67.1, et seq.

T. "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30.

U. "Willful violation" means an action or failure to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance.

CHAPTER TWO

I. REFERRALS TO THE ETHICS COMMISSION

A. Matters to be heard in a Show Cause Hearing.

1. Under this Chapter, the Ethics Commission will conduct a Show Cause Hearing on any referral, as defined by these Regulations, finding:

a. willful violations of the Sunshine Ordinance by City officers and employees (other than elected officials or department heads), or

b. non-willful violations of the Sunshine Ordinance by elected officials, department heads, or City officers and employees.

2. Complaints alleging willful violations of the Sunshine Ordinance against elected officials and department heads shall be handled pursuant to Chapter Three of these regulations.

B. Scheduling of Show Cause Hearing.

1. After receipt of a referral, the Commission shall schedule a Show Cause Hearing on the matter at the next regular Ethics Commission meeting, provided that the Show Cause Hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.

2. In the event that four or more Commissioners will not be present at the scheduled Show Cause Hearing, the Commission may reschedule or continue to the next practicable regular Ethics Commission meeting.

II. SHOW CAUSE HEARING

A. Public Hearing. The Show Cause Hearing shall be open to the public.

B. Standard of Proof. The Respondent(s) shall have the burden to show that he or she did not commit a violation of the Sunshine Ordinance.

C. Hearing Procedures.

1. Each Respondent and Complainant may speak on his or her own behalf, subject to the following time limits: each Respondent shall be permitted a five-minute statement; each Complainant shall be permitted a five-minute statement; and each Respondent shall be permitted a three-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.

2. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Each Respondent and Complainant may submit any documents to the Commission to support his or her position. Each party's written submission shall not exceed five pages, excluding supporting documents. Any documents so provided shall also be provided to the opposing party and shall be delivered to the Commission no later than five business days prior to the scheduled hearing. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail. Commissioners may question each party or any other person providing testimony regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.

3. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence.

D. Deliberations and Findings.

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. To determine that a violation of the Sunshine Ordinance did not occur, the Commission must conclude that, based on a preponderance of the evidence, the Respondent did not commit a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has not committed a violation of the Sunshine Ordinance. The finding that a Respondent did or did not commit a violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

E. Ethics Commission Orders.

1. If the Commission finds that a Respondent committed a violation of the Sunshine Ordinance, the Commission may issue orders requiring any or all of the following:

a. the Respondent(s) to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) violated the Sunshine Ordinance; and/or

c. The Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, or upon a finding of no violation, the Commission will take no further action on the matter.

F. Public Announcement.

Once the Commission determines that the Respondent did or did not commit a violation of the Sunshine Ordinance, the Commission will publicly announce this conclusion. The Commission's announcement may, but need not, include findings of law and fact.

CHAPTER THREE

I. COMPLAINTS ALLEGING WILLFUL VIOLATIONS OF THE SUNSHINE ORDINANCE BY ELECTED OFFICIALS OR DEPARTMENT HEADS OR COMPLAINTS FILED DIRECTLY WITH THE ETHICS COMMISSION ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE.

A. Matters heard under this Chapter.

1. Pursuant to Sunshine Ordinance, section 67.34, the Ethics Commission shall handle complaints alleging violations of the Sunshine Ordinance by an elected official or department head.

2. Pursuant to Sunshine Ordinance, section 67.35(d), if the District Attorney and/or Attorney General take no action for 40 days after receiving notification of a custodian's failure to comply with an order made pursuant to Sunshine Ordinance section 67.21(d) or (e), then the person who made the public record request may file a complaint directly with the Ethics Commission relating to that failure to comply.

3. Ethics Commission staff may initiate a complaint to allege a violation of the Sunshine Ordinance against any City officer or City employee.

4. This Chapter will govern:

a. referrals alleging willful violations of the Sunshine Ordinance against an elected official or department head, and

b. complaints initiated under subsections A.2 or A.3 alleging violations of the Sunshine Ordinance by any City officer or employee.

5. Any referral that does not allege a willful violation of the Sunshine Ordinance against an elected official or a department head shall be handled pursuant to Chapter Two of these regulations.

B. Scheduling of Hearing.

1. When the Executive Director receives a referral alleging a willful violation of the Sunshine Ordinance against an elected official or a department head, or when the Executive Director receives a complaint filed under subsection A.2, or when staff initiates a complaint under subsection A.3, the Executive Director shall, within 15 business days of the conclusion of his or her investigation, schedule a public hearing at the next regular meeting of the Commission, unless impracticable, provided that the hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.

2. Within 15 business days of the conclusion of his or her investigation, the Executive Director shall issue a written notice and his or her report and recommendation pursuant to Chapter Three, section II.C, to each Commission member, each Respondent, and each Complainant, including the date, time and location of the hearing.

3. In the case of a referral, the Executive Director also shall provide a courtesy notice and a copy of the report and recommendation to the referring body.

II. INVESTIGATION AND RECOMMENDATION

A. Factual Investigation.

Upon receipt of a complaint, the Executive Director shall conduct a factual investigation. The Executive Director's investigation may include, but shall not be limited to, interviews of the Respondent(s) and any witnesses, as well as the review of documentary and other evidence. The investigation shall be concluded within 30 days following the Executive Director's receipt of the complaint. The Executive Director may extend the time for good cause, including but not limited to: staffing levels; the number of other pending complaints under these Regulations or the Ethics Commission Regulations for Investigations and Enforcement Proceedings; other Ethics Commission proceedings; other staffing needs associated with pending campaigns; or the cooperation of witnesses, Complainants or Respondents. If the Executive Director extends the time for the investigation to conclude, his or her reasons for the extension shall be included in the report to the Ethics Commission.

B. Subpoenas.

During an investigation, the Executive Director may compel by subpoena the testimony of witnesses and the production of documents relevant to the investigation.

C. Report and Recommendation.

1. After the Executive Director has completed his or her investigation, the Executive Director shall prepare a written report and recommendation summarizing his or her factual and legal findings. The recommendation shall contain a summary of the relevant legal provisions and the evidence gathered through the Commission's investigation. To support the report and recommendation, the Executive Director may submit evidence through declaration. The report and recommendation shall not exceed ten pages excluding attachments.

2. The report shall recommend one of the following:

a. that Respondent(s) willfully violated the Sunshine Ordinance;

b. that Respondent(s) violated the Sunshine Ordinance but the violation was not willful; or

c. that Respondent(s) did not violate the Sunshine Ordinance.

D. Response to the Report and Recommendation.

1. Each Complainant and Respondent may submit a written response to the Director's report and recommendation. The response may contain legal arguments, a summary of evidence, and any mitigating or aggravating information. In support of the response, each Complainant and Respondent may submit evidence through declaration. The response shall not exceed ten pages excluding attachments.

2. If any Complainant or Respondent submits a response, he or she must deliver the response to all parties no later than five business days prior to the date of the hearing. The Complainant or Respondent must deliver eight copies of the response to the Executive Director, who must then immediately distribute copies of the response(s) to the Commission and any other Complainant or Respondent. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail.

III. PUBLIC HEARING

A. General Rules and Procedures.

1. The hearing shall be open to the public.

2. Each Complainant and Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.

3. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Commissioners may question each party regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.

4. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, Section I.E, then the Commission may make a decision in the party's absence.

5. Except when a complaint is staff-initiated or initiated pursuant to section 67.35(d), the Executive Director's role at the hearing will be limited to providing the report containing the legal and factual basis for his or her recommendation to the Commission and to respond to questions from the Commissioners.

B. Deliberations and Findings.

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance. The finding of a willful violation or non-willful violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

C. Ethics Commission Orders.

1. If the Commission finds that an elected official or a department head willfully violated the Sunshine Ordinance, the Commission shall so inform the Respondent's appointing authority, or the Mayor if Respondent is an elected official. In addition, the Commission may issue orders requiring any or all of the following if it finds that an elected official, a department head, or any City officer or City employee committed a violation of the Sunshine Ordinance:

a. the Respondent to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent violated the Sunshine Ordinance; and/or

c. the Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority, or the Mayor if the Respondent is an elected official, of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, the Commission will take no further action on the matter.

D. Finding of No Violation.

If the Commission determines that there is insufficient evidence to establish that the Respondent has committed a violation of the Sunshine Ordinance, the Commission shall publicly announce this fact. The Commission's announcement may, but need not, include findings of law and fact. Thereafter, the Commission will take no further action on the matter.

CHAPTER FOUR

I. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a complaint is filed with the Commission, no Commissioner shall engage in oral or written communications outside of a Commission meeting regarding the merits of the complaint with the Commission's staff, the Respondent(s), the Complainant(s), any member of the Task Force, the Supervisor of Records, any member of the public, or any person communicating on behalf of the Respondent(s), Complainant(s), the Supervisor of Records, or any member of the Task Force, except for communications, such as scheduling matters, generally conducted between a court and a party appearing before that court.

B. Access to Complaints and Related Documents and Deliberations.

Complaints, investigative files and information contained therein, shall be disclosed as necessary to the conduct of an investigation or as required by the California Public Records Act or the San Francisco Sunshine Ordinance. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff regarding complaints shall not be disclosed until the Commission has issued its final decision following the hearing.

C. Oaths and Affirmations.

The Commission may administer oaths and affirmations.

D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission and the public of the designation no later than the next business day.

E. Extensions of Time and Continuances.

1. Any Respondent or Complainant may request the continuance of a hearing date in writing. The requester must deliver the written request to the Commission Chairperson, and provide a copy of the request to all other parties no later than ten business days before the date of the hearing. The Commission Chairperson shall have the discretion to consider untimely requests. The Commission Chairperson shall approve or deny the request within five business days of the submission of the request. The Commission Chairperson may grant the request upon a showing of good cause.

2. The Commission or the Commission Chairperson may reschedule a hearing at their discretion for good cause.

At any time a hearing is placed on an agenda regarding a matter under Chapter II or III of these Regulations, four or more members must be in attendance. Otherwise, the hearing shall be continued to the next regular Ethics Commission meeting, unless impracticable.

F. Place of Delivery.

1. Whenever these Regulations require delivery to the Commission, its members, or the Executive Director, delivery shall be effected at the Commission office.

2. Whenever these Regulations require delivery to a Respondent or Complainant, delivery shall be effective and sufficient if made by U.S. mail, personal delivery or any other means of delivery agreed upon by the parties under Chapter One, section II, subsection K, to an address reasonably calculated to give notice to and reach the Respondent or Complainant.

3. Delivery is effective upon the date of delivery, not the date of receipt.

4. Delivery of documents to the Commission may be conducted via electronic mail after a written request is made and approved by the Executive Director.

G. Page Limitations and Format Requirements.

Whenever these Regulations impose a page limitation, a "page" means one side of an 8½ inch by 11 inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double-spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

H. Conclusion of Hearing.

For the purposes of these Regulations, a hearing concludes on the date on which the Commission announces its decision.

I. Complaints alleging both Sunshine Violations and Violations Handled Under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

If a complaint alleges both violations of the Sunshine Ordinance and violations handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings, the allegations involving violations of the Sunshine Ordinance shall be handled separately under these Regulations. Staff shall initiate a complaint of the alleged violations of the Sunshine Ordinance under Chapter Three, Section I.A.3 of these Regulations.

J. Certification by participating Commissioner if he or she did not attend proceedings held under Chapter II or III in their entirety.

Each Commissioner who participates in a decision, but who did not attend the hearing in its entirety, shall certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

II. SEVERABILITY

If any provision of these Regulations, or the application thereof, to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

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CITY & COUNTY OF SAN FRANCISCO

Provisions of the Sunshine Ordinance - Section 67

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Sec. 67.1 Findings And Purpose.

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

(a) Government"s duty is to serve the public, reaching its decisions in full view of the public.

(b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people"s business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.

(c) Although California has a long tradition of laws designed to protect the public"s access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.

(d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.

(e) Public officials who attempt to conduct the public"s business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public"s interest in open government.

(f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.

(g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.2. Citation.

This Chapter may be cited as the San Francisco Sunshine Ordinance. (Added hy Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.3. Definitions.

Whenever in this Article the following words or phrases are used, they shall have the following meanings:

(a) "City" shall mean the City and County of San Francisco.

(b) "Meeting" shall mean any of the following:

(1) A congregation of a majority of the members of a policy body at the same time and place;

(2) A series of gatherings, each of which involves less than a majority of a policy body, to hear, discuss or deliberate upon any item that is within the subject matter jurisdiction of the City, if the cumulative result is that a majority of members has become involved in such gatherings; or

(3) Any other use of personal intermediaries or communications media that could permit a majority of the members of a policy body to become aware of an item of business and of the views or positions of other members with respect thereto, and to negotiate consensus thereupon.

(4) "Meeting" shall not include any of the following:

(A) Individual contacts or conversations between a member of a policy body and another person that do not convey to the member the views or positions of other members upon the subject matter of the contact or conversation and in which the member does not solicit or encourage the restatement of the views of the other members;

(B) The attendance of a majority of the members of a policy body at a regional, statewide or national conference, or at a meeting organized to address a topic of local community concern and open to the public, provided that a majority of the members refrains from using the occasion to collectively discuss the topic of the gathering or any other business within the subject matter jurisdiction of the City; or

(C) The attendance of a majority of the members of a policy body at a purely social, recreational or ceremonial occasion other than one sponsored or organized by or for the policy body itself, provided that a majority of the members refrains from using the occasion to discuss any business within the subject matter jurisdiction of this body. A meal gathering of a policy body before, during or after a business meeting of the body is part of that meeting and shall be conducted only under circumstances that permit public access to hear and observe the discussion of members. Such meetings shall not be conducted in restaurants or other accommodations where public access is possible only in consideration of making a purchase or some other payment of value.

(D) Proceedings of the Department of Social Services Child Welfare Placement and Review Committee or similar committees which exist to consider confidential information and make decisions regarding Department of Social Services clients.

(c) "Passive meeting body" shall mean:

(1) Advisory committees created by the initiative of a member of a policy body, the Mayor, or a department head;

(2) Any group that meets to discuss with or advise the Mayor or any Department Head on fiscal, economic, or policy issues;

(3) Social, recreational or ceremonial occasions sponsored or organized by or for a policy body to which a majority of the body has been invited.

(4) "Passive meeting body" shall not include a committee that consists solely of employees of the City and County of San Francisco created by the initiative of a member of a policy body, the Mayor, or a department head;

(5) Notwithstanding the provisions of paragraph (4) above, "Passive meeting body" shall include a committee that consists solely of employees of the City and County of San Francisco when such committee is reviewing, developing, modifying, or creating city policies or procedures relating to the public health, safety, or welfare or relating to services for the homeless;

(d) "Policy Body" shall mean:

(1) The Board of Supervisors;

(2) Any other board or commission enumerated in the charter;

(3) Any board, commission, committee, or other body created by ordinance or resolution of the Board of Supervisors;

(4) Any advisory board, commission, committee or body, created by the initiative of a policy body;

(5) Any standing committee of a policy body irrespective of its composition.

(6) "Policy Body" shall not include a committee which consists solely of employees of the City and County of San Francisco, unless such committee was established by charter or by ordinance or resolution of the Board of Supervisors.

(7) Any advisory board, commission, committee, or council created by a federal, state, or local grant whose members are appointed by city officials, employees or agents. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 129-98, App. 4/17/98; Proposition G, 11/2/99)

Sec. 67.4. Passive Meetings.

(a) All gatherings of passive meeting bodies shall be accessible to individuals upon inquiry and to the extent possible consistent with the facilities in which they occur.

(1) Such gatherings need not be formally noticed, except on the City's website whenever possible, although the time, place and nature of the gathering shall be disclosed upon inquiry by a member of the public, and any agenda actually prepared for the gathering shall be accessible to such inquirers as a public record.

(2) Such gatherings need not be conducted in any particular space for the accommodation of members of the public, although members of the public shall be permitted to observe on a space available basis consistent with legal and practical restrictions on occupancy.

(3) Such gatherings of a business nature need not provide opportunities for comment by members of the public, although the person presiding may, in his or her discretion, entertain such questions or comments from spectators as may be relevant to the business of the gathering.

(4) Such gatherings of a social or ceremonial nature need not provide refreshments to spectators.

(5) Gatherings subject to this subsection include the following: advisory committees or other multimember bodies created in writing or by the initiative of, or otherwise primarily formed or existing to serve as a non-governmental advisor to, a member of a policy body, the Mayor, the City Administrator, a department head, or any elective officer, and social, recreational or ceremonial occasions sponsored or organized by or for a policy body to which a majority of the body has been invited. This subsection shall not apply to a committee which consists solely of employees of the City and County of San Francisco.

(6) Gatherings defined in subdivision (5) may hold closed sessions under circumstances allowed by this Article.

(b) To the extent not inconsistent with state or federal law, a policy body shall include in any contract with an entity that owns, operates or manages any property in which the City has or will have an ownership interest, including a mortgage, and on which the entity performs a government function related to the furtherance of health, safety or welfare, a requirement that any meeting of the governing board of the entity to address any matter relating to the property or its government related activities on the property, or performance under the contract or grant, be conducted as provided in subdivision (a) of this section. Records made available to the governing board relating to such matters shall be likewise available to the public, at a cost not to exceed the actual cost up to 10 cents per page, or at a higher actual cost as demonstrated in writing to such governing board. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 287-96, App. 7/12/96; Proposition G, 11/2/99)

Sec. 67.5. Meetings To Be Open And Public; Application Of Brown Act.

All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et. seq.) and of this article. In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.6. Conduct Of Business; Time And Place For Meetings.

(a) Each policy body, except for advisory bodies, shall establish by resolution or motion the time and place for holding regular meetings.

(b) Unless otherwise required by state or federal law or necessary to inspect real property or personal property which cannot be conveniently brought within the territory of the City and County of San Francisco or to meet with residents residing on property owned by the City, or to meet with residents of another jurisdiction to discuss actions of the policy body that affect those residents, all meetings of its policy bodies shall be held within the City and County of San Francisco.

(c) If a regular meeting would otherwise fall on a holiday, it shall instead be held on the next business day, unless otherwise rescheduled in advance.

(d) If, because of fire, flood, earthquake or other emergency, it would be unsafe to meet at the regular meeting place, meetings may be held for the duration of the emergency at some other place specified by the policy body. The change of meeting site shall be announced, by the most rapid means of communication available at the time, in a notice to the local media who have requested written notice of special meetings pursuant to Government Code Section 54956. Reasonable attempts shall be made to contact others regarding the change in meeting location.

(e) Meetings of passive meeting bodies as specified in Section 67.6(d)(4) of this article shall be preceded by notice delivered personally or by mail, e-mail, or facsimile as reasonably requested at least 72 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting. If the advisory body elects to hold regular meetings, it shall provide by bylaws, or whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. In such case, no notice of regular meetings, other than the posting of an agenda pursuant to Section 67.7 of this article in the place used by the policy body which it advises, is required.

(f) Special meetings of any policy body, including advisory bodies that choose to establish regular meeting times, may be called at any time by the presiding officer thereof or by a majority of the members thereof, by delivering personally or by mail written notice to each member of such policy body and the local media who have requested written notice of special meetings in writing. Such notice of a special meeting shall be delivered as described in (e) at least 72 hours before the time of such meeting as specified in the notice. The notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the presiding officer or secretary of the body or commission a written waiver of notice. Such waiver may be given by telegram. Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. Each special meeting shall be held at the regular meeting place of the policy body except that the policy body may designate an alternate meeting place provided that such alternate location is specified in the notice of the special meeting; further provided that the notice of the special meeting shall be given at least 15 days prior to said special meeting being held at an alternate location. This provision shall not apply where the alternative meeting location is located within the same building as the regular meeting place.

(g) If a meeting must be canceled, continued or rescheduled for any reason, notice of such change shall be provided to the public as soon as is reasonably possible, including posting of a cancellation notice in the same manner as described in section 67.7(c), and mailed notice if sufficient time permits. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.7. Agenda Requirements; Regular Meetings.

(a) At least 72 hours before a regular meeting, a policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. In addition, a policy body shall post a current agenda on its Internet site at least 72 hours before a regular meeting.

(b) A description is meaningful if it is suf-ficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted adjacent to the agenda or, if such documents are of more than one page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.

(c) The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

(d) No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a policy body may respond to statements made or questions posed by persons exercising their public testimony rights, to the extent of asking a question for clarification, providing a reference to staff or other resources for factual information, or requesting staff to report back to the body at a subsequent meeting concerning the matter raised by such testimony.

(e) Notwithstanding subdivision (d), the policy body may take action on items of business not appearing on the posted agenda under any of the following conditions:

(1) Upon a determination by a majority vote of the body that an accident, natural disaster or work force disruption poses a threat to public health and safety.

(2) Upon a good faith, reasonable determination by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that (A) the need to take immediate action on the item is so imperative as to threaten serious injury to the public interest if action were deferred to a subsequent special or regular meeting, or relates to a purely commendatory action, and (B) that the need for such action came to the attention of the body subsequent to the agenda being posted as specified in subdivision (a).

(3) The item was on an agenda posted pursuant to subdivision (a) for a prior meeting of the body occurring not more than five calendar days prior to the date action is taken on the item, and at the prior meeting the item was continued to the meeting at which action is being taken.

(f) Each board and commission enumerated in the charter shall ensure that agendas for regular and special meetings are made available to speech and hearing impaired persons through telecommunications devices for the deaf, telecommunications relay services or equivalent systems, and, upon request, to sight impaired persons through Braille or enlarged type.

(g) Each policy body shall ensure that notices and agendas for regular and special meetings shall include the following notice:

KNOW YOUR RIGHTS UNDER
THE SUNSHINE ORDINANCE

(Chapter 67 of the San Francisco Administrative Code)

Government"s duty is to serve the public, reaching its decisions in full view of the public.

Commissions, boards, councils and other agencies of the City and County exist to conduct the people"s business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people"s review.

FOR MORE INFORMATION
ON YOUR RIGHTS UNDER THE SUNSHINE
ORDINANCE OR TO REPORT A VIOLATION
OF THE ORDINANCE, CONTACT THE
SUNSHINE ORDINANCE TASK FORCE.

(h) Each agenda of a policy body covered by this Sunshine Ordinance shall include the address, area code and phone number, fax number, e-mail address, and a contact person"s name for the Sunshine Ordinance Task Force. Information on how to obtain a free copy of the Sunshine Ordinance shall be included on each agenda. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 292-95, App. 9/8/95; Ord. 185-96, App. 5/8/96; Proposition G, 11/2/99)

Sec. 67.7-1. Public Notice Requirements.

(a) Any public notice that is mailed, posted or published by a City department, board, agency or commission to residents residing within a specific area to inform those residents of a matter that may impact their property or that neighborhood area, shall be brief, concise and written in plain, easily understood English.

(b) The notice should inform the residents of the proposal or planned activity, the length of time planned for the activity, the effect of the proposal or activity, and a telephone contact for residents who have questions.

(c) If the notice informs the public of a public meeting or hearing, then the notice shall state that persons who are unable to attend the public meeting or hearing may submit to the City, by the time the proceeding begins, written comments regarding the subject of the meeting or hearing, that these comments will be made a part of the official public record, and that the comments will be brought to the attention of the person or persons conducting the public meeting or hearing. The notice should also state the name and address of the person or persons to whom those written comments should be submitted. (Added by Ord. 185-96, App. 5/8/96; amended by Proposition G, 11/2/99)

Sec. 67.8. Agenda Disclosures: Closed Sessions.

(a) In addition to the brief general description of items to be discussed or acted upon in open and public session, the agenda posted pursuant to Government Code Section 54954.2, any mailed notice given pursuant to Government Code Section 54954.1, and any call and notice delivered to the local media and posted pursuant to Government Code Section 54956 shall specify and disclose the nature of any closed sessions by providing all of the following information:

(1) With respect to a closed session held pursuant to Government Code Section 54956.7:

LICENSE/PERMIT DETERMINATION:

applicant(s)

The space shall be used to specify the number of persons whose applications are to be reviewed.

(2) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54956.8:

CONFERENCE WITH REAL PROPERTY NEGOTIATOR

Property:

Person(s) negotiating:

Under negotiation:

Price: Terms of payment: Both:

The space under "Property" shall be used to list an address, including cross streets where applicable, or other description or name which permits a reasonably ready identification of each parcel or structure subject to negotiation. The space under "Person(s) negotiating" shall be used to identify the person or persons with whom negotiations concerning that property are in progress. The spaces under "Under negotiation" shall be checked off as applicable to indicate which issues are to be discussed.

(3) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54956.9, either:

CONFERENCE WITH LEGAL COUNSEL

Existing litigation:

Unspecified to protect service of process

Unspecified to protect settlement posture

or:

CONFERENCE WITH LEGAL COUNSEL

Anticipated litigation:

As defendant As plaintiff

The space under "Existing litigation" shall be used to specifically identify a case under discussion pursuant to subdivision (a) of Government Code Section 54956.9, including the case name, court, and case number, unless the identification would jeopardize the City"s ability to effectuate service of process upon one or more unserved parties, in which instance the space in the next succeeding line shall be checked, or unless the identification would jeopardize the City"s ability to conclude existing settlement negotiations to its advantage, in which instance the space in the next succeeding line shall be checked. If the closed session is called pursuant to subdivision (b) or (c) of Section 54956.9, the appropriate space shall be checked under "Anticipated litigation" to indicate the City"s anticipated position as defendant or plaintiff respectively. If more than one instance of anticipated litigation is to be reviewed, space may be saved by entering the number of separate instances in the "As defendant" or "As plaintiff" spaces or both as appropriate.

(4) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54957, either:

THREAT TO PUBLIC SERVICES OR FACILITIES

Name, title and agency of law enforcement officer(s) to be conferred with:

or:

PUBLIC EMPLOYEE APPOINTMENT/HIRING

Title/description of position(s) to be filled:

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Position and, in the case of a routine evaluation, name of employee(s) being evaluated:

or:

PUBLIC EMPLOYEE DISMISSAL

Number of employees affected:

or:

(5) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54957.6, either:

CONFERENCE WITH NEGOTIATOR--COLLECTIVE BARGAINING

Name and title of City"s negotiator:

Organization(s) representing:

Police officers, firefighters and airport police

Transit Workers

Nurses

Miscellaneous Employees

Anticipated issue(s) under negotiation:

Wages

Hours

Benefits

Working Conditions

Other (specify if known)

All

Where renegotiating a memorandum of understanding or negotiating a successor memorandum of under-standing, the name of the memorandum of under-standing;

In case of multiple items of business under the same category, lines may be added and the location of information may be reformatted to eliminate unnecessary duplication and space, so long as the relationship of information concerning the same item is reasonably clear to the reader. As an alternative to the inclusion of lengthy lists of names or other information in the agenda, or as a means of adding items to an earlier completed agenda, the agenda may incorporate by reference separately prepared documents containing the required information, so long as copies of those documents are posted adjacent to the agenda within the time periods required by Government Code Sections 54954.2 and 54956 and provided with any mailed or delivered notices required by Sections 54954.1 or 54956. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.8-1. Additional Requirements for Closed Sessions.

(a) All closed sessions of any policy body covered by this Ordinance shall be either audio recorded or audio and video recorded in their entirety and all such recordings shall be retained for at least TEN years, or permanently where technologically and economically feasible. Closed session recordings shall be made available whenever all rationales for closing the session are no longer applicable. Recordings of closed sessions of a policy body covered by this Ordinance, wherein the justification for the closed session is due to "anticipated litigation" shall be released to the public in accordance with any of the following provisions: TWO years after the meeting if no litigation is filed; UPON EXPIRATION of the statute of limitations for the anticipated litigation if no litigation is filed; as soon as the controversy leading to anticipated litigation is settled or concluded.

(b) Each agenda item for a policy body covered by this ordinance that involve existing litigation shall identify the court, case number, and date the case was filed on the written agenda. For each agenda item for a group covered by this ordinance that involves anticipated litigation, the City Attorney"s Office or the policy body shall disclose at any time requested and to any member of the public whether such anticipated litigation developed into litigation and shall identify the court, case number, and date the case was filed. (Added by Proposition G, 11/2/99)

Sec. 67.9. Agendas And Related Materials: Public Records.

(a) Agendas of meetings and any other documents on file with the clerk of the policy body, when intended for distribution to all, or a majority of all, of the members of a policy body in connection with a matter anticipated for discussion or consideration at a public meeting shall be made available to the public. To the extent possible, such documents shall also be made available through the policy body"s Internet site. However, this disclosure need not include any material exempt from public disclosure under this ordinance.

(b) Records which are subject to disclosure under subdivision (a) and which are intended for distribution to a policy body prior to commencement of a public meeting shall be made available for public inspection and copying upon request prior to commencement of such meeting, whether or not actually distributed to or received by the body at the time of the request.

(c) Records which are subject to disclosure under subdivision (a) and which are distributed during a public meeting but prior to commencement of their discussion shall be made available for public inspection prior to commencement of, and during, their discussion.

(d) Records which are subject to disclosure under subdivision (a) and which are distributed during their discussion at a public meeting shall be made available for public inspection immediately or as soon thereafter as is practicable.

(e) A policy body may charge a duplication fee of one cent per page for a copy of a public record prepared for consideration at a public meeting, unless a special fee has been established pursuant to the procedure set forth in Section 67.28(d). Neither this section nor the California Public Records Act (Government Code sections 6250 et seq.) shall be construed to limit or delay the public"s right to inspect any record required to be disclosed by that act, whether or not distributed to a policy body. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.10. Closed Sessions: Permitted Topics.

A policy body may, but is not required to, hold closed sessions:

(a) With the Attorney General, district attorney, sheriff, or chief of police, or their respective deputies, on matters posing a threat to the security of public buildings or a threat to the public"s right of access to public services or public facilities.

(b) To consider the appointment, employment, evaluation of performance, or dismissal of a City employee, if the policy body has the authority to appoint, employ, or dismiss the employee, or to hear complaints or charges brought against the employee by another person or employee unless the employee complained of requests a public hearing. The body may exclude from any such public meeting, and shall exclude from any such closed meeting, during the comments of a complainant, any or all other complainants in the matter. The term "employee" as used in this section shall not include any elected official, member of a policy body or applicant for such a position, or person providing services to the City as an independent contractor or the employee thereof, including but not limited to independent attorneys or law firms providing legal services to the City for a fee rather than a salary.

(c) Notwithstanding section (b), an Executive Compensation Committee established pursuant to a Memorandum of Understanding with the

Municipal Executives Association may meet in closed session when evaluating the performance of an individual officer or employee subject to that Memorandum of Understanding or when establishing performance goals for such an officer or employee where the setting of such goals requires discussion of that individual"s performance.

(d) Based on advice of its legal counsel, and on a motion and vote in open session to assert the attorney-client privilege, to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would likely and unavoidably prejudice the position of the City in that litigation. Litigation shall be considered pending when any of the following circumstances exist:

(1) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the City is a party, has been initiated formally; or,

(2) A point has been reached where, in the opinion of the policy body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the City, or the body is meeting only to decide whether a closed session is authorized pursuant to that advice or, based on those facts and circumstances, the body has decided to initiate or is deciding whether to initiate litigation.

(3) A closed session may not be held under this section to consider the qualifications or engagement of an independent contract attorney or law firm, for litigation services or otherwise.

(e) With the City"s designated representatives regarding matters within the scope of collective bargaining or meeting and conferring with public employee organizations when a policy body has authority over such matters.

(1) Such closed sessions shall be for the purpose of reviewing the City"s position and instructing its designated representatives and may take place solely prior to and during active consultations and discussions between the City"s designated representatives and the representatives of employee organizations or the unrepresented employees. A policy body shall not discuss compensation or other contractual matters in closed session with one or more employees directly interested in the outcome of the negotiations.

(2) In addition to the closed sessions authorized by subsection 67.10(e)(1), a policy body subject to Government Code Section 3501 may hold closed sessions with its designated representatives on mandatory subjects within the scope of representation of its represented employees, as determined pursuant to Section 3504. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 37-98, App. 1/23/98; Proposition G, 11/2/99)

Sec. 67.11. Statement Of Reasons For Closed Sessions.

Prior to any closed session, a policy body shall state the general reason or reasons for the closed session, and shall cite the statutory authority, including the specific section and subdivision, or other legal authority under which the session is being held. In the closed session, the policy body may consider only those matters covered in its statement. In the case of regular and special meetings, the statement shall be made in the form of the agenda disclosures and specifications required by Section 67.8 of this article. In the case of adjourned and continued meetings, the statement shall be made with the same disclosures and specifications required by Section 67.8 of this article, as part of the notice provided for the meeting.

In the case of an item added to the agenda as a matter of urgent necessity, the statement shall be made prior to the determination of urgency and with the same disclosures and specifications as if the item had been included in the agenda pursuant to Section 67.8 of this article. Nothing in this section shall require or authorize a disclosure of information prohibited by state or federal law. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.12. Disclosure Of Closed Session Discussions And Actions.

(a) After every closed session, a policy body may in its discretion and in the public interest, disclose to the public any portion of its discussion that is not confidential under federal or state law, the Charter, or non-waivable privilege. The body shall, by motion and vote in open session, elect either to disclose no information or to disclose the information that a majority deems to be in the public interest. The disclosure shall be made through the presiding officer of the body or such other person, present in the closed session, whom he or she designates to convey the information.

(b) A policy body shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows:

(1) Real Property Negotiations: Approval given to a policy body"s negotiator concerning real estate negotiations pursuant to Government Code Section 54956.8 shall be reported as soon as the agreement is final. If its own approval renders the agreement final, the policy body shall report that approval, the substance of the agreement and the vote thereon in open session immediately. If final approval rests with another party to the negotiations, the body shall disclose the fact of that approval, the substance of the agreement and the body"s vote or votes thereon upon inquiry by any person, as soon as the other party or its agent has informed the body of its approval. If notwithstanding the final approval there are conditions precedent to the final consummation of the transaction, or there are multiple contiguous or closely located properties that are being considered for acquisition, the document referred to in subdivision (b) of this section need not be disclosed until the condition has been satisfied or the agreement has been reached with respect to all the properties, or both.

(2) Litigation: Direction or approval given to the body"s legal counsel to prosecute, defend or seek or refrain from seeking appellate review or relief, or to otherwise enter as a party, intervenor or amicus curiae in any form of litigation as the result of a consultation pursuant to Government Code Section 54956.9 shall be reported in open session as soon as given, or at the first meeting after an adverse party has been served in the matter if immediate disclosure of the City"s intentions would be contrary to the public interest. The report shall identify the adverse party or parties, any co-parties with the City, any existing claim or order to be defended against or any factual circumstances or contractual dispute giving rise to the City"s complaint, petition or other litigation initiative.

(3) Settlement: A policy body shall neither solicit nor agree to any term in a settlement which would preclude the release of the text of the settlement itself and any related documentation communicated to or received from the adverse party or parties. Any written settlement agreement and any documents attached to or referenced in the settlement agreement shall be made publicly available at least 10 calendar days before the meeting of the policy body at which the settlement is to be approved to the extent that the settlement would commit the City or a department thereof to adopting, modifying, or discontinuing an existing policy, practice or program or otherwise acting other than to pay an amount of money less than $50,000. The agenda for any meeting in which a settlement subject to this section is discussed shall identify the names of the parties, the case number, the court, and the material terms of the settlement. Where the disclosure of documents in a litigation matter that has been settled could be detrimental to the city"s interest in pending litigation arising from the same facts or incident and involving a party not a party to or otherwise aware of the settlement, the documents required to be disclosed by subdivision (b) of this section need not be disclosed until the other case is settled or otherwise finally concluded.

(4) Employee Actions: Action taken to appoint, employ, dismiss, transfer or accept the resignation of a public employee in closed session pursuant to Government Code Section 54957 shall be reported immediately in a manner that names the employee, the action taken and position affected and, in the case of dismissal for a violation of law or of the policy of the City, the reason for dismissal. "Dismissal" within the meaning of this ordinance includes any termination of employment at the will of the employer rather than of the employee, however characterized. The proposed terms of any separation agreement shall be immediately disclosed as soon as presented to the body, and its final terms shall be immediately disclosed upon approval by the body.

(5) Collective Bargaining: Any collectively bargained agreement shall be made publicly available at least 15 calendar days before the meeting of the policy body to which the agreement is to be reported.

(c) Reports required to be made immediately may be made orally or in writing, but shall be supported by copies of any contracts, settlement agreements, or other documents related to the transaction that were finally approved or adopted in the closed session and that embody the information required to be disclosed immediately shall be provided to any person who has made a written request regarding that item following the posting of the agenda, or who has made a standing request for all such documentation as part of a request for notice of meetings pursuant to Government Code Sections 54954.1 or 54956.

(d) A written summary of the information required to be immediately reported pursuant to this section, or documents embodying that information, shall be posted by the close of business on the next business day following the meeting, in the place where the meeting agendas of the body are posted. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.13. Barriers To Attendance Prohibited.

(a) No policy body shall conduct any meeting, conference or other function in any facility that excludes persons on the basis of actual or presumed class identity or characteristics, or which is inaccessible to persons with physical disabilities, or where members of the public may not be present without making a payment or purchase. Whenever the Board of Supervisors, a board or commission enumerated in the charter, or any committee thereof anticipates that the number of persons attending the meeting will exceed the legal capacity of the meeting room, any public address system used to amplify sound in the meeting room shall be extended by supplementary speakers to permit the overflow audience to listen to the proceedings in an adjacent room or passageway, unless such supplementary speakers would disrupt the operation of a City office.

(b) Each board and commission enumerated in the charter shall provide sign language interpreters or note-takers at each regular meeting, provided that a request for such services is communicated to the secretary or clerk of the board or commission at least 48 hours before the meeting, except for Monday meetings, for which the deadline shall be 4 p.m. of the last business day of the preceding week.

(c) Each board and commission enumerated in the charter shall ensure that accessible seating for persons with disabilities, including those using wheelchairs, is made available for each regular and special meeting.

(d) Each board and commission enumerated in the charter shall include on the agenda for each regular and special meeting the following statement: "In order to assist the City"s efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals."

(e) The Board of Supervisors shall seek to provide translators at each of its regular meetings and all meetings of its committees for each language requested, where the translation is necessary to enable San Francisco residents with limited English proficiency to participate in the proceedings provided that a request for such translation services is communicated to the Clerk of the Board of Supervisors at least 48 hours before the meeting. For meetings on a Monday or a Tuesday, the request must be made by noon of the last business day of the preceding week. The Clerk of the Board of Supervisors shall first solicit volunteers from the ranks of City employees and/or from the community to serve as translators. If volunteers are not available the Clerk of the Board of Supervisors may next solicit translators from non-profit agencies, which may be compensated. If these options do not provide the necessary translation services, the Clerk may employ professional translators. The unavailability of a translator shall not affect the ability of the Board of Supervisors or its committees to deliberate or vote upon any matter presented to them. In any calendar year in which the costs to the City for providing translator services under this subsection exceeds $20,000, the Board of Supervisors shall, as soon as possible thereafter, review the provisions of this subsection. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 292-95, App. 9/8/95; Ord. 482-96, App. 12/20/96; Proposition G, 11/2/99)

Sec. 67.14. Video and Audio Recording, Filming And Still Photography.

(a) Any person attending an open and public meeting of a policy body shall have the right to record the proceedings with an audio or video recorder or a still or motion picture camera, or to broadcast the proceedings, in the absence of a reasonable finding of the policy body that the recording or broadcast cannot continue without such noise, illumination or obstruction of view as to constitute a persistent disruption of the proceedings.

(b) Each board and commission enumerated in the charter shall audio record each regular and special meeting. Each such audio recording, and any audio or video recording of a meeting of any other policy body made at the direction of the policy body shall be a public record subject to inspection pursuant to the California Public Records Act (Government Code Section 6250 et seq.), and shall not be erased or destroyed. Inspection of any such recording shall be provided without charge on an appropriate play back device made available by the City. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

(c) Every City policy body, agency or department shall audio or video record every noticed regular meeting, special meeting, or hearing open to the public held in a City Hall hearing room that is equipped with audio or video recording facilities, except to the extent that such facilities may not be available for technical or other reasons. Each such audio or video recording shall be a public record subject to inspection pursuant to the California Public Records Act (Government Code Section 6250 et seq.), and shall not be erased or destroyed. The City shall make such audio or video recording available in digital form at a centralized location on the City's web site (www.sfgov.org) within seventy-two hours of the date of the meeting or hearing and for a period of at least two years after the date of the meeting or hearing. Inspection of any such recording shall also be provided without charge on an appropriate play back device made available by the City. This subsection (c) shall not he construed to limit or in any way modify the duties created by any other provision of this article, including but not limited to the requirements for recording closed sessions as stated in Section 67.8-1 and for recording meetings of boards and commissions enumerated in the Charter as stated in subsection (b) above. (Added by Ord. 80-08, App. 5/13/08)

Sec. 67.15. Public Testimony.

(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within policy body"s subject matter jurisdiction, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by Section 67.7(e) of this article. However, in the case of a meeting of the Board of Supervisors, the agenda need not provide an opportunity for members of the public to address the Board on any item that has already been considered by a committee, composed exclusively of members of the Board, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee"s consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the Board.

(b) Every agenda for special meetings at which action is proposed to be taken on an item shall provide an opportunity for each member of the public to directly address the body concerning that item prior to action thereupon.

(c) A policy body may adopt reasonable regulations to ensure that the intent of subdivisions (a) and (b) are carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker. Each policy body shall adopt a rule providing that each person wishing to speak on an item before the body at a regular or special meeting shall be permitted to be heard once for up to three minutes. Time limits shall be applied uniformly to members of the public wishing to testify.

(d) A policy body shall not abridge or prohibit public criticism of the policy, procedures, programs or services of the City, or of any other aspect of its proposals or activities, or of the acts or omissions of the body, on the basis that the performance of one or more public employees is implicated, or on any basis other than reasonable time constraints adopted in regulations pursuant to subdivision (c) of this section.

(e) To facilitate public input, any agenda changes or continuances shall be announced by the presiding officer of a policy body at the beginning of a meeting, or as soon thereafter as the change or continuance becomes known to such presiding officer. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.16. Minutes.

The clerk or secretary of each board and commission enumerated in the charter shall record the minutes for each regular and special meeting of the board or commission. The minutes shall state the time the meeting was called to order, the names of the members attending the meeting, the roll call vote on each matter considered at the meeting, the time the board or commission began and ended any closed session, the names of the members and the names, and titles where applicable, of any other persons attending any closed session, a list of those members of the public who spoke on each matter if the speakers identified themselves, whether such speakers supported or opposed the matter, a brief summary of each person"s statement during the public comment period for each agenda item, and the time the meeting was adjourned. Any person speaking during a public comment period may supply a brief written summary of their comments which shall, if no more than 150 words, be included in the minutes.

The draft minutes of each meeting shall be available for inspection and copying upon request no later than ten working days after the meeting. The officially adopted minutes shall be available for inspection and copying upon request no later than ten working days after the meeting at which the minutes are adopted. Upon request, minutes required to be produced by this section shall be made available in Braille or increased type size. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.17. Public Comment By Members Of Policy Bodies.

Every member of a policy body retains the full constitutional rights of a citizen to comment publicly on the wisdom or propriety of government

actions, including those of the policy body of which he or she is a member. Policy bodies shall not sanction, reprove or deprive members of their rights as elected or appointed officials for expressing their judgments or opinions, including those which deal with the perceived inconsistency of non-public discussions, communications or actions with the requirements of state or federal law or of this ordinance. The release of specific factual information made confidential by state or federal law including, but not limited to, the privilege for confidential attorney-client communications, may be the basis for a request for injunctive or declaratory relief, of a complaint to the Mayor seeking an accusation of misconduct, or both. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.20. Definitions.

Whenever in this article the following words or phrases are used, they shall mean:

(a) "Department" shall mean a department of the City and County of San Francisco.

(b) "Public Information" shall mean the content of "public records" as defined in the California Public Records Act (Government Code Section 6252), whether provided in documentary form or in an oral communication. "Public Information" shall not include "computer software" developed by the City and County of San Francisco as defined in the California Public Records Act (Government Code Section 6254.9).

(c) "Supervisor of Records" shall mean the City Attorney. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 375, App. 9/30/96; Proposition G, 11/2/99)

Sec. 67.21. Process For Gaining Access To Public Records; Administrative Appeals.

(a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.

(b) A custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

(c) A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person.

(d) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b), the person making the request may petition the supervisor of records for a determination whether the record requested is public. The supervisor of records shall inform the petitioner, as soon as possible and within 10 days, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person"s request. If the custodian refuses or fails to comply with any such order within 5 days, the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance.

(e) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) above or if a petition is denied or not acted on by the supervisor of public records, the person making the request may petition the Sunshine Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petition, and where otherwise desirable, this determination shall be in writing. Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person"s request. If the custodian refuses or fails to comply with any such order within 5 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance. The Board of Supervisors and the City Attorney"s office shall provide sufficient staff and resources to allow the Sunshine Task Force to fulfill its duties under this provision. Where requested by the petition, the Sunshine Task Force may conduct a public hearing concerning the records request denial. An authorized representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.

(f) The administrative remedy provided under this article shall in no way limit the availability of other administrative remedies provided to any person with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order

under this section, the superior court shall have jurisdiction to order compliance.

(g) In any court proceeding pursuant to this article there shall be a presumption that the record sougbt is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

<p>(h) On at least an annual basis, and as otherwise requested by the Sunshine Ordinance Task Force, the supervisor of public records shall prepare a tally and report of every petition brought before it for access to records since the time of its last tally and report. The report shall at least identify for each petition the record or records sought, the custodian of those records, the ruling of the supervisor of public records, whether any ruling was overturned by a court and whether orders given to custodians of public records were followed. The report shall also summarize any court actions during that period regarding petitions the Supervisor has decided. At the request of the Sunshine Ordinance Task Force, the report shall also include copies of all rulings made hy the supervisor of public records and all opinions issued.

(i) The San Francisco City Attorney"s office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public. The City Attorney may publish legal opinions in response to a request from any person as to whether a record or information is public. All communications with the City Attorney"s Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records.

(j) Notwithstanding the provisions of this section, the City Attorney may defend the City or a City Employee in litigation under this ordinance that is actually filed in court to any extent required by the City Charter or California Law.

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

(l) Inspection and copying of documentary public information stored in electronic form shall be made available to the person requesting the information in any form requested which is available to or easily generated by the department, its officers or employees, including disk, tape, printout or monitor at a charge no greater than the cost of the media on which it is duplicated. Inspection of documentary public information on a computer monitor need not be allowed where the information sought is necessarily and unseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department to program or reprogram a computer to respond to a request for information or to release information wbere the release of that information would violate a licensing agreement or copyright law. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 253-96, App. 6/19/96; Proposition G, 11/2/99)

Sec. 67.21-1. Policy Regarding Use And Purchase Of Computer Systems.

(a) It is the policy of tbe City and County of San Francisco to utilize computer technology in order to reduce the cost of public records management, including the costs of collecting, maintaining, and disclosing records subject to disclosure to members of the public under this section. To the extent that it is technologically and economically feasible, departments that use computer systems to collect and store public records shall program and design these systems to ensure convenient, efficient, and economical public access to records and shall make public records easily accessible over public networks such as the Internet.

(b) Departments purchasing new computer systems shall attempt to reach the following goals as a means to achieve lower costs to the public in connection with the public disclosure of records:

(1) Implementing a computer system in which exempt information is segregated or filed separately from otherwise disclosable information.

(2) Implementing a system that permits reproduction of electronic copies of records in a format that is generally recognized as an industry standard format.

(3) Implementing a system that permits making records available througb the largest non-profit, non-proprietary public computer network, consistent with the requirement for security of information. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 253-96, App. 6/19/96; Proposition G, 11/2/99)

Sec. 67.22. Release Of Oral Public Information.

Release of oral public information shall be accomplisbed as follows:

(a) Every department head shall designate a person or persons knowledgable about the affairs of the department, to provide information, including oral information, to the public about the department"s operations, plans, policies and positions. The department head may designate himself or herself for this assignment, but in any event shall arrange that an alternate be available for this function during the absence of the person assigned primary responsibility. If a department has multiple bureaus or divisions, the department may designate a person or persons for each bureau or division to provide this information.

(b) The role of the person or persons so designated shall be to provide information on as timely and responsive a basis as possible to those members of the public who are not requesting information from a specific person. This section shall not be interpreted to curtail existing informal contacts between employees and members of the public when these contacts are occasional, acceptable to the employee and the department, not disruptive of his or her operational duties and confined to accurate information not confidential by law.

(c) No employee shall be required to respond to an inquiry or inquiries from an individual if it would take the employee more than fifteen minutes

to obtain the information responsive to the inquiry or inquiries.

(d) Public employees shall not be discouraged from or disciplined for the expression of their personal opinions on any matter of public concern while not on duty, so long as the opinion (1) is not represented as that of the department and does not misrepresent the department position; and (2) does not disrupt coworker relations, impair discipline or control by superiors, erode a close working relationship premised on personal loyalty and confidentiality, interfere with the employee"s performance of his or her duties or obstruct the routine operation of the office in a manner that outweighs the employee"s interests in expressing that opinion. In adopting this subdivision, the Board of Supervisors intends merely to restate and affirm court decisions recognizing the First Amendment rights enjoyed by public employees. Nothing in this section shall be construed to provide rights to City employees beyond those recognized by courts, now or in the future, under the First Amendment, or to create any new private cause of action or defense to disciplinary action.

(e) Notwithstanding any other provisions of this ordinance, public employees shall not be discouraged from or disciplined for disclosing any information that is public information or a public record to any journalist or any member of the public. Any public employee who is disciplined for disclosing public information or a public record shall have a cause of action against the City and the supervisor imposing the discipline. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.23. Public Review File--Policy Body Communications.

(a) The clerk of the Board of Supervisors and the clerk of each board and commission enumerated in the charter shall maintain a file, accessible to any person during normal office hours, containing a copy of any letter, memorandum or other communication which the clerk has distributed to or received from a quorum of the policy body concerning a matter calendared by the body within the previous 30 days or likely to be calendared within the next 30 days, irrespective of subject matter, origin or recipient, except commercial solicitations, periodical publications or communications exempt from disclosure under the California Public Records Act (Government Code Section 6250 et seq.) and not deemed disclosable under Section 67.24 of this article.

(b) Communications, as described in subsection (a), sent or received in the last three business days shall be maintained in chronological order in the office of the department head or at a place nearby, clearly designated to the public. After documents have been on file for two full days, they may be removed, and, in the discretion of the board or commission, placed in a monthly chronological file.

(c) Multiple-page reports, studies or analyses which are accompanied by a letter or memorandum of transmittal need not be included in the file so long as the letter or memorandum of transmittal is included. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.24. Public Information That Must Be Disclosed.

Notwithstanding a department"s legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

(a) Drafts and Memoranda.

(1) Except as provided in subparagraph (2), no preliminary draft or department memorandum, whether in printed or electronic form, shall be exempt from disclosure under Government Code Section 6254, subdivision (a) or any other provision. If such a document is not normally kept on file and would otherwise be disposed of, its factual content is not exempt under subdivision (a). Only the recommendation of the author may, in such circumstances, be withheld as exempt.

(2) Draft versions of an agreement being negotiated by representatives of the City with some other party need not be disclosed immediately upon creation but must be preserved and made available for public review for 10 days prior to the presentation of the agreement for approval by a policy body, unless the body finds that and articulates how the public interest would be unavoidably and substantially harmed by compliance with this 10 day rule, provided that policy body as used in this subdivision does not include committees. In the case of negotiations for a contract, lease or other business agreement in which an agency of the City is offering to provide facilities or services in direct competition with other public or private entities that are not required by law to make their competing proposals public or do not in fact make their proposals public, the policy body may postpone public access to the final draft agreement until it is presented to it for approval.

(b) Litigation Material.

(1) Notwithstanding any exemptions otherwise provided by law, the following are public records subject to disclosure under this Ordinance:

(i) A pre-litigation claim against the City;

(ii) A record previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created;

(iii) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance.

(2) Unless otherwise privileged under California law, when litigation is finally adjudicated or otherwise settled, records of all communications between the department and the adverse party shall be subject to disclosure, including the text and terms of any settlement.

(c) Personnel Information. None of the following shall be exempt from disclosure under Government Code Section 6254, subdivision (c), or any other provision of California Law where disclosure is not forbidden:

(1) The job pool characteristics and employment and education histories of all successful job applicants, including at a minimum the following

information as to each successful job applicant:

(i) Sex, age and ethnic group;

(ii) Years of graduate and undergraduate study, degree(s) and major or discipline;

(iii) Years of employment in the private and/or public sector;

(iv) Whether currently employed in the same position for another public agency.

(v) Other non-identifying particulars as to experience, credentials, aptitudes, training or education entered in or attached to a standard employment application form used for the position in question.

(2) The professional biography or curriculum vitae of any employee, provided that the home address, home telephone number, social security number, age, and marital status of the employee shall be redacted.

(3) The job description of every employment classification.

(4) The exact gross salary and City-paid benefits available to every employee.

(5) Any memorandum of understanding between the City or department and a recognized employee organization.

(6) The amount, basis, and recipient of any performance-based increase in compensation, benefits, or both, or any other bonus, awarded to any employee, which shall be announced during the open session of a policy body at which the award is approved.

(7) The record of any confirmed misconduct of a public employee involving personal dishonesty, misappropriation of public funds, resources or benefits, unlawful discrimination against another on the basis of status, abuse of authority, or violence, and of any discipline imposed for such misconduct.

(d) Law Enforcement Information.

The District Attorney, Chief of Police, and Sheriff are encouraged to cooperate with the press and other members of the public in allowing access to local records pertaining to investigations, arrests, and other law enforcement activity. However, no provision of this ordinance is intended to abrogate or interfere with the constitutional and statutory power and duties of the District Attorney and Sheriff as interpreted under Government Code section 25303, or other applicable state law or judicial decision. Records pertaining to any investigation, arrest or other law enforcement activity shall be disclosed to the public once the District Attorney or court determines that a prosecution will not be sought against the subject involved, or once the statute of limitations for filing charges has expired, whichever occurs first. Notwithstanding the occurrence of any such event, individual items of information in the following categories may be segregated and withheld if, on the particular facts, the public interest in nondisclosure clearly and substantially outweighs the public interest in disclosure:

(1) The names of juvenile witnesses (whose identities may nevertheless be indicated by substituting a number or alphabetical letter for each individual interviewed);

(2) Personal or otherwise private information related to or unrelated to the investigation if disclosure would constitute an unwarranted invasion of privacy;

(3) The identity of a confidential source;

(4) Secret investigative techniques or procedures;

(5) Information whose disclosure would endanger law enforcement personnel; or

(6) Information whose disclosure would endanger the successful completion of an investigation where the prospect of enforcement proceedings is concrete and definite.

This subdivision shall not exempt from disclosure any portion of any record of a concluded inspection or enforcement action by an officer or department responsible for regulatory protection of the public health, safety, or welfare.

(e) Contracts, Bids and Proposals

(1) Contracts, contractors" bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person"s or organization"s net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(2) Notwithstanding the provisions of this subdivision or any other provision of this ordinance, the Director of Public Health may withhold from disclosure proposed and final rates of payment for managed health care contracts if the Director determines that public disclosure would adversely affect the ability of the City to engage in effective negotiations for managed health care contracts. The authority to withhold this information applies only to contracts pursuant to which the City (through the Department of Public Health) either pays for health care services or

receives compensation for providing such services, including mental health and substance abuse services, to covered beneficiaries through a pre-arranged rate of payment. This provision also applies to rates for managed health care contracts for the University of California, San Francisco, if the contract involves beneficiaries who receive services provided jointly by the City and University. This provision shall not authorize the Director to withhold rate information from disclosure for more than three years.

(3) During the course of negotiations for:

(i) personal, professional, or other contractual services not subject to a competitive process or where such a process has arrived at a stage where there is only one qualified or responsive bidder;

(ii) leases or permits having total anticipated revenue or expense to the City and County of five hundred thousand dollars ($500,000) or more or having a term of ten years or more; or

(iii) any franchise agreements,

all documents exchanged and related to the position of the parties, including draft contracts, shall be made available for public inspection and copying upon request. In the event that no records are prepared or exchanged during negotiations in the above-mentioned categories, or the records exchanged do not provide a meaningful representation of the respective positions, the city attorney or city representative familiar with the negotiations shall, upon a written request by a member of the public, prepare written summaries of the respective positions within five working days following the final day of negotiation of any given week. The summaries will be available for public inspection and copying. Upon completion of negotiations, the executed contract, including the dollar amount of said contract, shall be made available for inspection and copying. At the end of each fiscal year, each City department shall provide to the Board of Supervisors a list of all sole source contracts entered into during the past fiscal year. This list shall be made available for inspection and copying as provided for elsewhere in this Article.

(f) Budgets and Other Financial Information. Budgets, whether tentative, proposed or adopted, for the City or any of its departments, programs, projects or other categories, and all bills, claims, invoices, vouchers or other records of payment obligations as well as records of actual disbursements showing the amount paid, the payee and the purpose for which payment is made, other than payments for social or other services whose records are confidential by law, shall not be exempt from disclosure under any circumstances.

(g) Neither the City nor any office, employee, or agent thereof may assert California Public Records Act Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance.

(h) Neither the City nor any office, employee, or agent thereof may assert an exemption for withholding for any document or information based on a "deliberative process" exemption, either as provided by California Public Records Act Section 6255 or any other provision of law that does not prohibit disclosure.

(i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 292-95, App. 9/8/95; Ord. 240-98, App. 7/17/98; Proposition G, 11/2/99)

Sec. 67.25. Immediacy Of Response.

(a) Notwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, a written request for information described in any category of non-exempt public information shall be satisfied no later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject line, or cover sheet in which the request is transmitted. Maximum deadlines provided in this article are appropriate for more extensive or demanding requests, but shall not be used to delay fulfilling a simple, routine or otherwise readily answerable request.

(b) If the voluminous nature of the information requested, its location in a remote storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6456.1, the requester shall be notified as required by the close of business on the business day following the request.

(c) The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure. Where a record being requested contains information most of which is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requester of the nature and extent of the non-exempt information and inquire as to the requester"s purpose for seeking it, in order to suggest alternative sources for the information which may involve less redaction or to otherwise prepare a response to the request.

(d) Notwithstanding any provisions of California Law or this ordinance, in response to a request for information describing any category of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records as soon as reasonably possible on an incremental or "rolling" basis such that responsive records are produced as soon as possible by the end of the same business day that they are reviewed and collected. This section is intended to prohibit the withholding of public records that are responsive to a records request until all potentially responsive documents have been reviewed and collected. Failure to comply with this provision is a violation of this article. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.26. Withholding Kept To A Minimum.

No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute. Information that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of this article. This work shall be done personally by the attorney or other staff member conducting the exemption review. The work of responding to a public-records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.27. Justification Of Withholding.

Any withholding of information shall be justified, in writing, as follows:

(a) A withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, shall cite that authority.

(b) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act or elsewhere.

(c) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any specific statutory or case law, or any other public agency"s litigation experience, supporting that position.

(d) When a record being requested contains information, most of which is exempt from disclosure under the California Public Records Act and this Article, the custodian shall inform the requester of the nature and extent of the nonexempt information and suggest alternative sources for the information requested, if available. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.28. Fees For Duplication.

(a) No fee shall be charged for making public records available for review.

(b) For documents routinely produced in multiple copies for distribution, e.g. meeting agendas and related materials, unless a special fee has been established pursuant to subdivision (d) of this section, a fee not to exceed one cent per page may be charged, plus any postage costs.

(c) For documents assembled and copied to the order of the requester, unless a special fee has been established pursuant to subdivision (d) of this section, a fee not to exceed 10 cents per page may be charged, plus any postage.

(d) A department may establish and charge a higher fee than the one cent presumptive fee in subdivision (b) and the 10 cent presumptive fee in subdivision (c) if it prepares and posts an itemized cost analysis establishing that its cost per page impression exceeds 10 cents or one cent, as the case may be. The cost per page impression shall include the following costs: one sheet of paper; one duplication cycle of the copying machine in terms of toner and other specifically identified operation or maintenance factors, excluding electrical power. Any such cost analysis shall identify the manufacturer, model, vendor and maintenance contractor, if any, of the copying machine or machines referred to.

(e) Video copies of video recorded meetings shall be provided to the public upon request for $10.00 or less per meeting. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67.29. Index To Records.

The City and County shall prepare a public records index that identifies the types of information and documents maintained by City and County departments, agencies, boards, commissions, and elected officers. The index shall be for the use of City officials, staff and the general public, and shall be organized to permit a general understanding of the types of information maintained, by which officials and departments, for which purposes and for what periods of retention, and under what manner of organization for accessing, e.g. by reference to a name, a date, a proceeding or project, or some other referencing system. The index need not be in such detail as to identify files or records concerning a specific person, transaction or other event, but shall clearly indicate where and how records of that type are kept. Any such master index shall be reviewed by appropriate staff for accuracy and presented for formal adoption to the administrative official or policy body responsible for the indexed records. The City Administrator shall be responsible for the preparation of this records index. The City Administrator shall report on the progress of the index to the Sunshine Ordinance Task Force on at least a semi-annual basis until the index is completed. Each department, agency, commission and public official shall cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity and those documents received in the ordinary course of business and the types of requests that are regularly received. Each department, agency, commission and public official is encouraged to solicit and encourage public participation to develop a meaningful records index. The index shall clearly and meaningfully describe, with as much specificity as practicable, the individual types of records that are prepared or maintained by each department, agency, commission or public official of the City and County. The index shall be sufficient to aid the public in making an inquiry or a request to inspect. Any changes in the department, agency, commission or public official"s practices or procedures affecting the accuracy of the information provided to the City Administrator shall be recorded by the City Administrator on a periodic basis so as to maintain the integrity and accuracy of the index. The index shall be continuously maintained on the City"s World Wide Website and made available at public libraries within the City and County of San Francisco. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 287-96, App. 7/12/96; Proposition G, 11/2/99)

Sec. 67.29-1. Records Survive Transition Of Officials.

All documents prepared, received, or maintained by the Office of the Mayor, by any elected city and county official, and by the head of any City or County Department are the property of the City and County of San Francisco. The originals of these documents shall be maintained consistent with the records retention policies of the City and County of San Francisco. (Added by Proposition G, 11/2/99)

Sec. 67.29-2. Internet Access/World Wide Web Minimum Standards.

Each department of the City and County of San Francisco shall maintain on a World Wide Web site, or on a comparable, readily accessible location on the Internet, information that it is required to make publicly available. Each department is encouraged to make publicly available through its World Wide Web site, as much information and as many documents as possible concerning its activities. At a minimum, within six months after enactment of this provision, each department shall post on its World Wide Web site all meeting notices required under this ordinance, agendas and the minutes of all previous meetings of its policy bodies for the last three years. Notices and agendas shall be posted no later than the time that the department otherwise distributes this information to the public, allowing reasonable time for posting. Minutes of meetings shall be posted as soon as possible, but in any event within 48 hours after they have been approved. Each department shall make reasonable efforts to ensure that its World Wide Web site is regularly reviewed for timeliness and updated on at least a weekly basis. The City and County shall also make available on its World Wide Web site, or on a comparable, readily accessible location on the Internet, a current copy of the City Charter and all City Codes. (Added by Proposition G, 11/2/99)

SEC. 67.29-3.

Any future agreements between the city and an advertising space provider shall be public records and shall include as a basis for the termination of the contract any action by, or permitted by, the space provider to remove or deface or otherwise interfere with an advertisement without first notifying the advertiser and the city and obtaining the advertiser"s consent. In the event advertisements are defaced or vandalized, the space provider shall provide written notice to the city and the advertiser and shall allow the advertiser the option of replacing the defaced or vandalized material. Any request by any city official or by any space provider to remove or alter any advertising must be in writing and shall be a public record. (Added by Proposition G, 11/2/99)

Sec. 67.29-4. Lobbyist On Behalf Of The City.

(a) Any lobbyist who contracts for economic consideration with the City and County of San Francisco to represent the City and County in matters before any local, regional, state, or federal administrative or legislative body shall file a public records report of their activities on a quarterly basis with the San Francisco Ethics Commission. This report shall be maintained by the Ethics Commission and not be exempt from disclosure. Each quarterly report shall identify all financial expenditures by the lobbyist, the individual or entity to whom each expenditure was made, the date the expenditure was made, and specifically identify the local, state, regional or national legislative or administrative action the lobbyist supported or opposed in making the expenditure. The failure to file a quarterly report with the required disclosures shall be a violation of this Ordinance.

(b) No person shall be deemed a lobbyist under section (a), unless that person receives or becomes entitled to receive at least $300 total compensation in any month for influencing legislative or administrative action on behalf of the City and County of San Francisco or has at least 25 separate contacts with local, state, regional or national officials for the purpose of influencing legislative or administrative action within any two consecutive months. No business or organization shall be deemed as a lobbyist under section (a) unless it compensates its employees or members for their lobbying activities on behalf of the City and County of San Francisco, and the compensated employees or members have at least 25 separate contacts with local, state, regional or national officials for the purpose of influencing legislative or administrative action within any two consecutive months. "Total compensation" shall be calculated by combining all compensation received from the City and County of San Francisco during the month for lobbying activities on matters at the local, state, regional or national level. "Total number of contacts" shall be calculated by combining all contacts made during the two-month period on behalf of the City and County of San Francisco for all lobbying activities on maters at the local, state, regional or national level.

(c) Funds of the City and County of San Francisco, including organizational dues, shall not be used to support any lobbying efforts to restrict public access to records, information, or meetings, except where such effort is solely for the purpose of protecting the identity and privacy rights of private citizens. (Added by Proposition G, 11/2/99)

Sec. 67.29-5. Calendars Of Certain Officials.

The Mayor, The City Attorney, and every Department Head shall keep or cause to be kept a daily calendar wherein is recorded the time and place of each meeting or event attended by that official, with the exclusion of purely personal or social events at which no city business is discussed and that do not take place at City Offices or at the offices or residences of people who do substantial business with or are otherwise substantially financially affected by actions of the city. For meetings not otherwise publicly recorded, the calendar shall include a general statement of issues discussed. Such calendars shall be public records and shall be available to any requester three business days subsequent to the calendar entry date. (Added by Proposition G, 11/2/99)

Sec. 67.29-6. Sources Of Outside Funding.

No official or employee or agent of the city shall accept, allow to be collected, or direct or influence the spending of, any money, or any goods or services worth more than one hundred dollars in aggregate, for the purpose of carrying out or assisting any City function unless the amount and source of all such funds is disclosed as a public record and made available on the website for the department to which the funds are directed. When such funds are provided or managed by an entity, and not an individual, that entity must agree in writing to abide by this ordinance. The disclosure shall include the names of all individuals or organizations contributing such money and a statement as to any financial interest the

contributor has involving the City. (Added by Proposition G, 11/2/99)

Sec. 67.29-7. Correspondence And Records Shall Be Maintained.

(a) The Mayor and all Department Heads shall maintain and preserve in a professional and businesslike manner all documents and correspondence, including but not limited to letters, e-mails, drafts, memorandum, invoices, reports and proposals and shall disclose all such records in accordance with this ordinance.

(b) The Department of Elections shall keep and preserve all records and invoices relating to the design and printing of ballots and other election materials and shall keep and preserve records documenting who had custody of ballots from the time ballots are cast until ballots are received and certified by the Department of Elections.

(c) In any contract, agreement or permit between the City and any outside entity that authorizes that entity to demand any funds or fees from citizens, the City shall ensure that accurate records of each transaction are maintained in a professional and businesslike manner and are available to the public as public records under the provisions of this ordinance. Failure of an entity to comply with these provisions shall be grounds for terminating the contract or for imposing a financial penalty equal to one-half of the fees derived under the agreement or permit during the period of time when the failure was in effect. Failure of any Department Head under this provision shall be a violation of this ordinance. This paragraph shall apply to any agreement allowing an entity to tow or impound vehicles in the City and shall apply to any agreement allowing an entity to collect any fee from any persons in any pretrial diversion program. (Added by Proposition G, 11/2/99)

Sec. 67.30. The Sunshine Ordinance Task Force.

(a) There is hereby established a task force to be known as the Sunshine Ordinance Task Force consisting of eleven voting members appointed by the Board of Supervisors. All members must have experience and/or demonstrated interest in the issues of citizen access and participation in local government. Two members shall be appointed from individuals whose names have been submitted by the local chapter of the Society of Professional Journalists, one of whom shall be an attorney and one of whom shall be a local journalist. One member shall be appointed from the press or electronic media. One member shall be appointed from individuals whose names have been submitted by the local chapter of the League of Women Voters. Four members shall be members of the public who have demonstrated interest in or have experience in the issues of citizen access and participation in local government. Two members shall be members of the public experienced in consumer advocacy. One member shall be a journalist from a racial/ethnic-minority-owned news organization and shall be appointed from individuals whose names have been submitted by New California Media. At all times the task force shall include at least one member who shall be a member of the public who is physically handicapped and who has demonstrated interest in citizen access and participation in local government. The Mayor or his or her designee, and the Clerk of the Board of Supervisors or his or her designee, shall serve as non-voting members of the task force. The City Attorney shall serve as legal advisor to the task force. The Sunshine Ordinance Task Force shall, at its request, have assigned to in an attorney from within the City Attorney"s Office or other appropriate City Office, who is experienced in public-access law matters. This attorney shall serve solely as a legal advisor and advocate to the Task Force and an ethical wall will be maintained between the work of this attorney on behalf of the Task Force and any person or Office that the Task Force determines may have a conflict of interest with regard to the matters being handled by the attorney.

(b) The term of each appointive member shall be two years unless earlier removed by the Board of Supervisors. In the event of such removal or in the event a vacancy otherwise occurs during the term of office of any appointive member, a successor shall be appointed for the unexpired term of the office vacated in a manner similar to that described herein for the initial members. The task force shall elect a chair from among its appointive members. The term of office as chair shall he one year. Members of the task force shall serve without compensation.

(c) The task force shall advise the Board of Supervisors and provide information to other City departments on appropriate ways in which to implement this chapter. The task force shall develop appropriate goals to ensure practical and timely implementation of this chapter. The task force shall propose to the Board of Supervisors amendments to this chapter. The task force shall report to the Board of Supervisors at least once annually on any practical or policy problems encountered in the administration of this chapter. The Task Force shall receive and review the annual report of the Supervisor of Public Records and may request additional reports or information as it deems necessary. The Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this ordinance or the Acts. The Task Force shall, from time to time as it sees fit, issue public reports evaluating compliance with this ordinance and related California laws by the City or any Department, Office, or Official thereof.

(d) In addition to the powers specified above, the Task Force shall possess such powers as the Board of Supervisors may confer upon it by ordinance or as the People of San Francisco shall confer upon it by initiative.

(e) The Task Force Commission shall approve by-laws specifying a general schedule for meetings, requirements for attendance by Task Force members, and procedures and criteria for removing members for non-attendance. (Added hy Ord. 265-93, App. 8/18/93; amended by Ord. 118-94, App. 3/18/94; Ord. 432-94, App. 12/30/94; Ord. 287-96, App. 7/12/96; Ord. 198-98, App. 6/19/98; 387-98, App. 12/24/98; Proposition G, 11/2/99)

Sec. 67.31. Responsibility For Administration.

The Mayor shall administer and coordinate the implementation of the provisions of this chapter for departments under his or her control. The Mayor shall administer and coordinate the implementation of the provisions of this chapter for departments under the control of hoard and commissions appointed by the Mayor. Elected officers shall administer and coordinate the implementation of the provisions of this chapter for

departments under their respective control. The Clerk of the Board of Supervisors shall provide a full-time staff person to perform administrative duties for the Sunshine Ordinance Task Force and to assist any person in gaining access to public meetings or public information. The Clerk of the Board of Supervisors shall provide that staff person with whatever facilities and equipment are necessary to perform said duties. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 287-96, App. 7/12/96; Proposition G, 11/2/99)

Sec. 67.32. Provision Of Services To Other Agencies; Sunshine Required.

It is the policy of the City and County of San Francisco to ensure opportunities for informed civic participation embodied in this Ordinance to all local, state, regional and federal agencies and institutions with which it maintains continuing legal and political relationships. Officers, agents and other representatives of the City shall continually, consistently and assertively work to seek commitments to enact open meetings, public information and citizen comment policies by these agencies and institutions, including but not limited to the Presidio Trust, the San Francisco Unified School District, the San Francisco Community College District, the San Francisco Transportation Authority, the San Francisco Housing Authority, the Treasure Island Development Authority, the San Francisco Redevelopment Authority and the University of California. To the extent not expressly prohibited by law, copies of all written communications with the above identified entities and any City employee, officer, agents, or and representative, shall be accessible as public records. To the extent not expressly prohibited by law, any meeting of the governing body of any such agency and institution at which City officers, agents or representatives are present in their official capacities shall be open to the public, and this provision cannot be waived by any City officer, agent or representative. The city shall give no subsidy in money, tax abatements, land, or services to any private entity unless that private entity agrees in writing to provide the city with financial projections (including profit and loss figures), and annual audited financial statements for the project thereafter, for the project upon which the subsidy is based and all such projections and financial statements shall be public records that must be disclosed. (Added by Proposition G, 11/2/99)

Sec. 67.33. Department Head Declaration.

All City department heads and all City management employees and all employees or officials who are required to sign an affidavit of financial interest with the Ethics Commission shall sign an annual affidavit or declaration stating under penalty of perjury that they have read the Sunshine Ordinance and have attended or will attend when next offered, a training session on the Sunshine Ordinance, to be held at least once annually. The affidavit or declarations shall be maintained by the Ethics Commission and shall be available as a public record. Annual training shall be provided by the San Francisco City Attorney"s Office with the assistance of the Sunshine Ordinance Task Force. (Added by Proposition G, 11/2/99)

Sec. 67.34. Willful Failure Shall Be Official Misconduct.

The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission. (Added by Proposition G, 11/2/99)

Sec. 67.35. Enforcement Provisions.

(a) Any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance or to enforce his or her right to attend any meeting required under this Ordinance to be open, or to compel such meeting to be open.

(b) A court shall award costs and reasonable attorneys" fees to the plaintiff who is the prevailing party in an action brought to enforce this Ordinance.

(c) If a court finds that an action filed pursuant to this section is frivolous, the City and County may assert its rights to be paid its reasonable attorneys" fees and costs.

(d) Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed. (Added by Proposition G, 11/2/99)

Sec. 67.36. Sunshine Ordinance Supersedes Other Local Laws.

The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply. (Added by Proposition G, 11/2/99)

Sec. 67.37. Severability.

The provisions of this chapter are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this chapter, or the invalidity of the application thereof to any person or circumstances, shall not affect the validity of the remainder of this chapter, or the validity of its application to other persons or circumstances. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67a.1. Prohibiting The Use Of Cell Phones, Pagers And Similar Sound-Producing Electrical Devices At And During Public Meetings.

At and during a public meeting of any policy body governed by the San Francisco Sunshine Ordinance, the ringing and use of cell phones, pagers and similar sound-producing electronic devices shall be prohibited. The presiding officer of any public meeting which is disrupted may order the removal from the meeting room of any person(s) responsible for the ringing or use of a cell phone, pager, or other similar sound-producing

electronic devices. The presiding officer may allow an expelled person to return to the public meeting following an agreement by the expelled person to comply with the provisions of this Section. A warning of the provisions of this Section shall be printed on all meeting agendas, and shall be explained at the beginning of each public meeting by the presiding officer. (Added by Ord. 286-00, File No. 001155. App. 12/22/2000)

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC., Plaintiff and Respondent, v. GEORGE DEUKMEJIAN, as Attorney General, etc., et al., Defendants and Appellants

S.F. No. 24207

Supreme Court of California

32 Cal. 3d 440; *651 P.2d 822*; *186 Cal. Rptr. 235*; *1982 Cal. LEXIS 229*; *8 Media L. Rep. 2436*

September 27, 1982

SUBSEQUENT HISTORY: Respondent's Petition for a Rehearing was Denied November 15, 1982, and the Opinion was Modified to Read as Printed Above. Newman, J., and Reynoso, J., did not Participate therein. Bird, C. J., was of the Opinion that the Petition should be Granted.

PRIOR HISTORY: Superior Court of Sacramento County, No. 262181, Frances N. Carr, Judge.

DISPOSITION: The portion of the judgment of the superior court requiring disclosure of the Interstate Organized Crime Index printouts is affirmed. The portion of that judgment requiring disclosure of the Law Enforcement Intelligence Unit index cards is reversed. The cause is remanded to the superior court for further proceedings consistent with this opinion. Each side shall bear its own costs on appeal. [15]

> 15 Plaintiff seeks attorney fees pursuant to *Government Code section 6259*. The trial court should determine the fees to be awarded, taking into account not only the matters litigated on this appeal, but also the other items included in plaintiff's complaint (see fn. 4, *ante*).

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Personal Information > General Overview

[HN1] *Cal. Gov't Code § 6254(c)* exempts personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files

[HN2] Language in the federal Freedom of Information Act, *5 U.S.C.S. § 552(b)(6)*, identical to that of *Cal. Gov't Code § 6254(c)*, bars disclosure whenever release of information would constitute a clearly unwarranted invasion of privacy, regardless of the nature of the file in which the information is stored.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > General Overview

[HN3] *Cal. Gov't Code § 6254(k)* exempts from disclosure records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

Administrative Law > Governmental Information >

Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
Governments > Federal Government > Domestic Security
[HN4] The California Public Records Act, *Cal. Gov't Code § 6250 et seq.* (1974), limits the personal identifiers exemption to investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records (A) interferes with enforcement proceedings, (B) deprives a person of a right to a fair trial or an impartial adjudication, (C) constitutes an unwarranted invasion of personal privacy, (D) discloses the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) discloses investigative techniques and procedures, or (F) endangers the life or physical safety of law enforcement personnel. *5 U.S.C.S. § 552(b)(7).*

Administrative Law > Governmental Information > Freedom of Information > General Overview
Governments > Courts > Court Records
[HN5] Where nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the California Open Records Act, *Cal. Gov't Code § 6250 et seq.*, to make public records available for public inspection and copying unless a particular statute makes them exempt. The burden of segregating exempt from nonexempt materials remains one of the considerations which the court can take into account in determining whether the public interest favors disclosure under *Cal. Gov't Code § 6255.*

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A civil liberties organization brought suit under the Public Records Act (*Gov. Code, § 6250 et seq.*) after a state agency refused its request for certain index cards and computer printouts relating to organized crime suspects. The request was refused on grounds that the information came within the exemption from disclosure accorded intelligence information (*Gov. Code, § 6254, subd. (f)*). The trial court ruled that data on the cards and printouts was subject to disclosure, except for personal identifiers and information which might reveal confidential sources, and entered judgment accordingly. (Superior Court of Sacramento County, No. 262181, Frances N. Carr, Judge.)

The Supreme Court affirmed the portion of the judgment requiring disclosure of the computer printouts, reversed the portion requiring disclosure of the index cards, and remanded for further proceedings consistent with its opinion. The court held the statutory protection against disclosure of intelligence information was improperly limited to personal identifiers and material which might disclose confidential sources, holding instead that the "intelligence information" exemption also bars the disclosure of information supplied in confidence, even if such information does not reveal the identity of a confidential source. Balancing the burdens and costs of disclosing the remaining nonexempt information on the index cards against the public interest to be served by disclosure, the court further held that defendants were entitled to refuse disclosure of the cards in their entirety, since the benefit to be gained from disclosure of the nonexempt portions was marginal and speculative, and since the burden of segregating exempt from nonexempt information would be substantial. As to the computer printouts, the court held that their disclosure was properly compelled, since the information thereon was not confidential and did not involve confidential sources, and since the task of segregating exempt material was thus reduced to one of excising personal identifiers. (Opinion by Broussard, J., with Mosk, Newman and Kaus, JJ., concurring. Separate concurring and dissenting opinion by Richardson, J. Separate concurring and dissenting opinion by Bird, C. J.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Records and Recording Laws § 12--Inspection of Public Records--Intelligence Information--Personal Identifiers. -- --Personal identifiers contained in certain law enforcement documents were not exempt from disclosure under *Gov. Code, § 6254, subd. (c)*, since the exemption from disclosure provided by such subdivision is confined to "personnel, medical, or similar files." However, they were exempt under a similar exemption for personal identifiers which was read into the

"intelligence information" exemption from disclosure provided by *Gov. Code, § 6254, subd. (f)*.

(2a) (2b) **Records and Recording Laws § 12--Inspection of Public Records--Intelligence Information.** -- --In an action under the Public Records Act (*Gov. Code, § 6250 et seq.*) to compel disclosure of certain index cards compiled by law enforcement departments which listed organized crime suspects, the trial court erred in concluding the exemption from disclosure accorded intelligence information (*Gov. Code, § 6254, subd. (f)*) was confined to personal identifiers and information which might reveal confidential sources. While not exempting all information reasonably related to criminal activity, the "intelligence information" exemption also bars the disclosure of information supplied in confidence, even if such information does not reveal the identity of a confidential source. Further, the exclusion of personal identifiers includes information from which the identity of the individual in question might be inferred.

(3) Records and Recording Laws § 12--Inspection of Public Records--Law Enforcement Investigatory Files--Prospect of Enforcement Proceedings. -- --In invoking the Public Records Act's exemption from disclosure accorded investigatory records compiled for law enforcement purposes (*Gov. Code, § 6254, subd. (f)*), the requirement that the information sought relate to a definite prospect of enforcement proceedings is applicable only to information which is not itself exempt from compelled disclosure, but claims exemption only as part of an investigatory file. Information independently exempt, such as intelligence information, is not subject to the requirement that it relate to a definite prospect of enforcement proceedings.

(4) Records and Recording Laws § 12--Inspection of Public Records--Balancing Test. -- --In ruling on a request for the disclosure of information under the Public Records Act (*Gov. Code, § 6250 et seq.*), the burdens and costs of disclosure, including any expense and inconvenience involved in segregating nonexempt from exempt information, must be weighed against the public interest served by disclosure (*Gov. Code, § 6255*). Thus, law enforcement officials were entitled to refuse disclosure of certain index cards which listed organized crime suspects, even though some of the information fell outside the exemption for intelligence information (*Gov. Code, § 6254, subd. (f)*), where the benefit from disclosure of the nonexempt portions was marginal and speculative and where the burden of segregating exempt from nonexempt information would be substantial. However, the disclosure of certain computer printouts was required, where the information on such printouts was not confidential and did not involve confidential sources, and where the task of segregating exempt material was thus reduced to one of excising personal identifiers.

COUNSEL: George Deukmejian, Attorney General, Richard D. Martland and Anthony L. Dicce, Deputy Attorneys General, for Defendants and Appellants.

Edwin L. Miller, Jr., District Attorney (San Diego), Peter C. Lehman and Henry R. Mann, Deputy District Attorneys, as Amici Curiae on behalf of Defendants and Appellants.

Margaret C. Crosby, Alan L. Schlosser, Amitai Schwartz and Brent A. Barnhart for Plaintiff and Respondent.

JUDGES: Opinion by Broussard, J., with Mosk, Newman and Kaus, JJ., concurring. Separate concurring and dissenting opinion by Richardson, J. Separate concurring and dissenting opinion by Bird, C. J.

OPINION BY: BROUSSARD

OPINION

[*443] [**823] [***236] Pursuant to the California Public Records Act (*Gov. Code, § 6250 et seq.* hereafter the Act), [1] petitioner American Civil Liberties Union Foundation of Northern California, Inc. (ACLU) sought to inspect and copy, among other things, certain index cards and computer printouts held by defendant California Department of Justice. The department refused to allow inspection on the ground that the information in question was "intelligence information" exempt from disclosure under *section 6254, subdivision (f)* of the Act. The ACLU then brought suit to compel production of these records. The trial court, after inspecting the records *in camera*, ruled that data on the cards and printouts should be disclosed with the exception of personal identifiers and information which might reveal confidential sources. Defendants appeal from that decision.

1 Unless otherwise indicated, all statutory references are to the Government Code.

The first issue presented by this appeal is the definition and scope of the exemption for "intelligence information" in *section 6254, subdivision (f)*. We agree with the trial court that this exemption should not be read so broadly as to preclude discovery of any information in intelligence files which relates in some manner to criminal activity. We believe, however, that the court erred in limiting the statutory protection to personal identifiers and material which might disclose confidential sources. The term "intelligence information," even if read narrowly so as to further the Act's objective of expanded public disclosure, should protect information furnished in confidence, even if that information does not reveal the identity of a confidential source. Thus the "intelligence information" exemption severely limits the information subject to disclosure, but does not entirely protect the index cards and printouts.

[*444] [***237] Secondly, defendants invoke the balancing test of *section 6255*, asserting that the burden of segregating exempt and nonexempt information outweighs the benefits of disclosure. The issue is close, but after *in camera* inspection of the index cards in [**824] question, we conclude that in this case the segregation of personal identifiers, confidential information, and information which might reveal confidential sources will be so burdensome, and will so reduce the utility of disclosing the documents to the ACLU, that the public interest will not be served by requiring disclosure of the index cards. We therefore reverse the trial court's judgment to the extent it compels disclosure of nonexempt information on the cards in question. The computer printouts, on the other hand, contain neither confidential information nor information supplied by confidential sources, but only data derived from public records. Excision of personal identifiers from the printouts would be a relatively simple task. We therefore affirm the portion of the trial court's judgment requiring disclosure of nonexempt information on the printouts.

I.

This case arose when the ACLU, in May of 1976, filed a request under the Act to inspect and copy a number of documents relating to state law enforcement surveillance practices and records. Among those documents were index cards compiled by a network of law enforcement departments known as the Law Enforcement Intelligence Unit (LEIU), listing persons suspected of being involved in organized crime. Each card lists, among other data, the individual's name, alias, occupation, family members, vehicles, associates, arrests, modus operandi, and physical traits. The subject of a card may be a person suspected of a specific crime; a person suspected of aiding, directly or indirectly, those involved in organized crime; or a person who is "associated" with a principal suspect. "Associates" might be individuals entirely innocent of crime, including family members, business associates, or attorneys of the principal suspects. [2]

> 2 The ACLU cites a striking example of the potential for abuse in unmonitored gathering of information by law enforcement agencies. Briefly, former State Senator Nate Holden was listed as one of six "associates" of Black Panther Party member Michael Zinzun on the latter's index card. That card was disclosed in litigation in Chicago and was, therefore, on file in other places outside California. Holden, who had never been arrested or convicted of a crime, had rented a house to Zinzun for about four months.

The ACLU also sought to inspect and copy computer printouts from the Interstate Organized Crime Index (IOCI). The IOCI printouts, in contrast to the LEIU index cards, contain entries based solely on information [*445] that is a matter of public record. [3] Existing IOCI printouts are still being used by law enforcement agencies but no new information is being added to them. The printout entries include, among other information, an individual subject's name, physical characteristics, criminal record, crime-related and noncrime-related associates, occupation, and residence.

> 3 The department's Organized Crime Criminal Intelligence Branch is the coordinating agency not only for the LEIU which produces the index cards, but also for the nationwide computer system which formerly produced the printouts. That system, the IOCI, was originally funded by a grant from the Law Enforcement Assistance Administration (now defunct); one condition of that grant was that the computer entries be based on information that was a matter of public record.

The ACLU's objective in seeking disclosure was to determine generally the nature of the information contained on the LEIU cards and stored in the IOCI computers, not to ascertain the entries relating to any

particular person. The ACLU, therefore, requested the first 100 cards in alphabetical order in the LEIU index and the first 100 entries in the computer printouts, omitting personal identifiers protected from disclosure by *section 6254, subdivision (c)*. [4] When [**825] [***238] the department refused to permit inspection, the ACLU, charging that the department had violated the Act, brought suit to compel disclosure.

4 The ACLU's original request included a total of nine items; in addition to the cards and printouts, the ACLU sought disclosure of annual reports submitted to the Legislature by the department's Organized Crime Criminal Intelligence Branch (OCCIB), notes and texts of briefings given to the Legislature, a catalog of OCCIB publications, the OCCIB policy statement with regard to maintenance or establishment of political files, lists of training conferences, a hardware index, and the current issue of various publications. Some of these items were produced voluntarily; others were produced at the order of the trial court; others did not exist or had been discontinued. On appeal, defendants challenged the trial court's order only insofar as it applied to the index cards and printouts.

At trial, the department claimed the records in question were protected by *section 6254, subdivision (f)* of the Act, which permits the state to withhold "[records] of complaints to or investigations conducted by, or records of *intelligence information* or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency . . . for correctional, law enforcement or licensing purposes . . . ." (Italics added.) The department also claimed an exemption under *section 6255*, which permits an agency to avoid disclosure of materials by showing that "on the facts of the particular case the public interest served by not making the record [*446] public clearly outweighs the public interest served by disclosure of the record."

(1) (See fn. 5.) The trial court first rejected the department's claim of exemption under *section 6254*, holding that the exemptions in that section were confined to (1) personal identifiers, [5] i.e., information which might reveal the names of those who were the subjects of the cards and printouts, and (2) information which might reveal the names of confidential sources who gave the department the card and printout data. The trial court further found that "[public] revelation of the information other than personal identifiers and confidential sources . . . is in the public interest and the public interest weighs in favor of disclosure. Revelation of this information will inform interested members of the public of the type of information which the defendants develop and gather." Although the trial court initially concluded that separation of exempt from nonexempt information on the LEIU cards and the IOCI printouts would be unduly burdensome, on motion to modify the judgment the court reversed its decision and found that the burden of segregating nonexempt information was outweighed by the public interest in access to that information. The trial court therefore rejected the claimed exemption under *section 6255*, [6] and [***239] accordingly entered judgment requiring disclosure, among other matters, of the [**826] LEIU index cards and the IOCI printouts, excluding personal identifiers and data which would reveal confidential sources.

5 The ACLU, as we have noted, expressly excluded from its disclosure request "personal identifiers such as names of subjects [protected] by *Government Code § 6254(c)*." [HN1] This section exempts "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Since subdivision (c) is confined to "personnel, medical, or similar files," the personal identifiers in the cards and printouts here at issue would not be exempt under that section. We read a similar exemption for personal identifiers into the "intelligence information" exemption in subdivision (f).

A recent decision of the United States Supreme Court (*United States v. Washington Post Co. (1982) 456 U.S. 595 [72 L.Ed.2d 358, 102 S.Ct. 1957]* ruled that [HN2] language in the federal Freedom of Information Act (*5 U.S.C. § 552(b)(6)*), identical to that of *section 6254, subdivision (c)*, bars disclosure whenever release of information would constitute a clearly unwarranted invasion of privacy, regardless of the nature of the "file" in which the information is stored. Under this interpretation, *section 6254, subdivision (c)* would bar disclosure of personal identifiers in the cards and printouts.

6 [HN3] *Section 6254, subdivision (k)*, exempts from disclosure "[records] the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." This section thus incorporates the privilege for "official information" of *Evidence Code section 1040*. As the trial court observed, however, *section 1040* involves a balancing test similar to that required by *section 6255*; thus, the court's rejection of the exemption under *section 6255* on the ground that the public interest weighs in favor of disclosure led the court to reject also claims of exemption under *section 6254, subdivision (k)* and *Evidence Code section 1040*.

For discussion of the relationship between *section 6254, subdivision (k)* and *Evidence Code section 1040*, and a comparison of the balancing tests required in those sections, see Note, *The California Public Records Act: The Public's Right of Access to Governmental Information* (1976) 7 Pacific L.J. 105, 121-125.

[*447] II.

The Act, enacted in 1968, replaced a confusing mass of statutes and court decisions relating to disclosure of governmental records. (See Shaffer, et al., *A Look at the California Records Act and Its Exemptions* (1974) 4 Golden Gate L.Rev. 203, 210-213.) The Act begins with a declaration of rights: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." In the spirit of this declaration, judicial decisions interpreting the Act seek to balance the public right to access to information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy. (See *Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 651-652 [117 Cal.Rptr. 106]*; *American Federation of State, etc. Employees v. Regents of University of California (1978) 80 Cal.App.3d 913, 915-916 [146 Cal.Rptr. 42]*.)

The Act was modeled on the 1967 federal Freedom of Information Act (81 Stat. 54), and the judicial construction and legislative history of the federal act serve to illuminate the interpretation of its California counterpart. (*See Northern Cal. Police Practices Project v. Craig (1979) 90 Cal.App.3d 116, 120 [153 Cal.Rptr. 173]*; *Cook v. Craig (1976) 55 Cal.App.3d 773, 781 [127 Cal.Rptr. 712]*; *Black Panther Party v. Kehoe, supra, 42 Cal.App.3d 645, 652*.) As enacted in 1967, the Freedom of Information Act exempted "investigatory records compiled for law enforcement purposes." (See former *5 U.S.C. § 552 (b)(7)*.) [7] The California Act, enacted in 1968, elaborated on this exemption, [*448] barring disclosure of "[records] of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. . . ." [8]

7 The 1967 federal act contained no express mention of "intelligence information." It did incorporate other statutory exemptions, including a statute (*50 U.S.C. § 403(d)(3)*) which orders the Director of the Central Intelligence Agency to protect "intelligence sources." The federal courts have construed that enactment to bar disclosure of information relating to national security which could not have been obtained without guaranteeing the confidentiality of the source. (*Sims v. Central Intelligence Agency (D.C.Cir. 1980) 642 F.2d 562, 571*.)

It is unlikely that the California Legislature, when it enacted an exemption for "intelligence information," had in mind protection of information and sources relating to national security. The language of *section 6254, subdivision (f)* suggests instead that the Legislature considered "intelligence information" a subclassification of the broader exemption for law enforcement investigatory records under the 1967 federal act.

8 Defendants, claiming that the "intelligence information" exemption was intended to encompass all information on the LEIU index and the IOCI printouts, rely on the fact that state budget bills antedating the Act refer to the California Department of Justice's cooperative information exchange with the FBI. These bills, however, relate not to the indexing systems involved here, but to the National Crime

Information Center telecommunications system which linked existing department records with a federal computer. In any case, proof that the Legislature was aware of an information exchange system does not shed any light on whether it intended to protect all information in that system from disclosure.

When a series of federal decisions held that under the 1967 law all documents in a law enforcement investigatory file were exempt, [9] [***240] Congress amended the Freedom of [**827] Information Act to narrow and clarify the exemptions from disclosure. (See *Pratt v. Webster (D.C.Cir. 1982) 673 F.2d 408, 417*; *Clinnax Molybdenum Co. v. N. L. R. B. (10th Cir. 1976) 539 F.2d 63, 64*; *Poss v. N. L. R. B. (10th Cir. 1977) 565 F.2d 654, 657.*) [HN4] The act, as amended in 1974, limited the exemption to "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting [*449] a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; . . ." (*5 U.S.C. § 552(b)(7)*.) Since the 1974 amendments were adopted to reinstate the scope of the exemption as intended in the original act (see *Clinnax Molybdenum Co. v. N. L. R. B., supra, 539 F.2d 63, 64)*, and since the California law was modeled upon that original act, we may use the amendments to guide the construction of the California Act.

9 See *Weisberg v. U.S. Department of Justice (D.C.Cir. 1973) 489 F.2d 1195* (en banc), (spectrographic analysis of the bullet that killed President Kennedy is exempt since it is part of an FBI file compiled for law enforcement purposes, and nothing else is relevant); *Aspin v. Department of Defense (D.C.Cir. 1973) 491 F.2d 24* (four-volume report on the coverup of the My-Lai massacre exempt in its entirety); *Ditlow v. Brinegar (D.C.Cir. 1974) 494 F.2d 1073* (letters between the National Highway Traffic Safety Administration and automobile manufacturers concerning possible safety defects protected by exemption 7, even though the only potential defendants have information); *Center for National Policy Review on Race and Urban Issues v. Weinberger (D.C.Cir. 1974) 502 F.2d 370* (since future fund cutoff proceeding, while unlikely and admittedly speculative, was conceivable, HEW's title VI Civil Rights Compliance Reports concerning segregation and discrimination practices in northern public schools could be kept secret).

(2a) We therefore reject defendants' contention that the "intelligence information" exemption of *section 6254, subdivision (f)*, exempts all information which is "reasonably related to criminal activity." Such a broad exemption would in essence resurrect the federal judicial doctrine which Congress repudiated in 1974, and which was never part of California law. (3) (See fn. 10.) It would undercut the California decisions which in some circumstances limit the exemption of subdivision (f) to cases involving concrete and definite enforcement prospects. [10] And most important, it would effectively exclude the law enforcement function of state and local governments from any public scrutiny under the California Act, a result inconsistent with its fundamental purpose.

10 In *Bristol-Meyers Company v. F. T. C. (D.C.Cir. 1970) 424 F.2d 935, 939*, the court limited the federal exemption in the 1967 act to cases in which the prospect of enforcement proceedings is concrete and definite. The California Court of Appeal adopted the *Bristol-Meyers* definition. (*Uribe v. Howie (1971) 19 Cal.App.3d 194, 213 [96 Cal.Rptr. 493]*; see *State of California* ex rel. *Division of Industrial Safety v. Superior Court (1974) 43 Cal.App.3d 778, 784 [117 Cal.Rptr. 726]*; *Younger v. Berkeley City Council (1975) 45 Cal.App.3d 825, 833 [119 Cal.Rptr. 830]*.) By 1976, however, the federal courts had generally rejected the *Bristol-Meyers* holding limiting the exemption to cases with concrete enforcement possibilities. (See Note, *op. cit. supra*, 7 Pacific L.J. 105, 127-128 and cases there cited.) The most recent Supreme Court decision on *section 552, subdivision (b)(7)* upholds an exemption for investigatory records without considering the

prospects for enforcement (*United States v. Washington Post Co., supra, 456 U.S. 595.*)

The *Bristol-Meyers* doctrine, as adopted in *Uribe v. Howie, supra, 19 Cal.App.3d 194*, nevertheless remains viable as a construction of the Act. As explained in *Younger v. Berkeley City Council, supra, 45 Cal.App.3d 825, 833*, however, that doctrine relates only to information which is not itself exempt from compelled disclosure, but claims exemption only as part of an investigatory file. Information independently exempt, such as "intelligence information" in the present case, is not subject to the requirement that it relate to a concrete and definite prospect of enforcement proceedings.

[***241] **(2b)** We believe, however, that the definition adopted by the trial court is too narrow. We do not dispute its exemption of "personal identifiers"; such an exemption would be required, if not by the express terms of the Act, by the right of privacy established in *article I, section* [*450] *1 of the California Constitution*. Indeed, in view of the substantial harm that could be inflicted by a public [**828] revelation that an individual was listed in an index of persons involved in organized crime, or even listed as an "associate" of someone involved in organized crime, we think the exclusion of personal identifiers must be viewed broadly. Not only names, aliases, addresses, and telephone numbers must be excluded, but also information which might lead the knowledgeable or inquisitive to infer the identity of the individual in question.

We agree also that information which might lead to the disclosure of confidential sources should be exempt from disclosure. The terms of subdivision (f), however, do not protect sources as such, but protect "intelligence information." We thus see no escape from the conclusion that information supplied in confidence is protected by the Act even if the revelation of that information will not necessarily disclose the identity of the source.

We conclude that the "intelligence information" exemption bars disclosure of information that might identify individuals mentioned in the LEIU or IOCI records, that might identify confidential sources, or that was supplied in confidence by its original source. [11]

11 We agree with the trial court that information is not "confidential" in this context unless treated as confidential by its original source. Thus, information does not become confidential because the California Department of Justice and the submitting law enforcement agency agree to treat it as such; it is confidential only if the law enforcement agency obtained it in confidence originally.

Amicus calls our attention to a definition of "confidential information" in the Information Practices Act of 1977 (*Civ. Code, § 1798 et seq.*). That definition includes as "confidential" all information compiled by law enforcement agencies "for the purpose of a criminal investigation of suspected criminal activities, including reports of informants and investigators, and associated with an identifiable individual." (*Civ. Code, § 1798.3, subd. (a)(1).*) It is not clear, however, if this definition would encompass the LEIU cards or the IOCI printouts, since those materials are not necessarily compiled for the purpose of a current investigation. In any event, *Civil Code section 1798.24, subdivision (g)*, makes it clear that information classed as confidential under the Information Practices Act may still be disclosed pursuant to the California Act; thus, the Information Practices Act definition cannot be used to define an exemption under the California Act.

The foregoing construction of *section 6254, subdivision (f)* will bring that exemption into approximate alignment with the exemption in *section 552, subdivision (b)(7)* of the amended federal act. We recognize, of course, that California has not enacted any amendments to the Act comparable to the 1974 federal amendments, but then the California Legislature faced no overly restrictive court decisions such as those [*451] which impelled the federal amendments. As we have explained, the 1974 federal amendments were intended to restate and clarify the original purpose of the federal act, and since that purpose -- public access to records except where access must be limited to protect privacy or confidentiality -- corresponds to the purpose of the California Act, we believe the two statutes should receive a parallel construction.

Our interpretation of subdivision (f) also derives from the fact that the Act imposes no limits upon who may seek information or what he may do with it. In the

present case the ACLU seeks information to test the operation of the LEIU index and the IOCI printouts and to determine if those police intelligence systems are being misused. In other cases, however, information may be sought for less noble purposes. Persons connected with organized crime may seek to discover what the police know, or do not know, about organized criminal activities (cf. *Federal Bureau of Investigation v. Abramson (1982) 456 U.S. 615, fn. 12 [72 L.Ed.2d 376, 387, 102 S.Ct. 2054]*); persons seeking to damage the reputation of another may try to discover if he is listed as an organized crime [***242] figure or as an associate of such a figure; other persons may simply try to put the state to the burden and expense of segregating exempt and nonexempt information and making the latter available to the public. In short, once information is held subject to disclosure under the Act, the courts can exercise no restraint on the use to [**829] which it may be put. (See *Black Panther Party v. Kehoe, supra, 42 Cal.App.3d 645, 656.*)

We note, by way of contrast to the unrestricted seeking and use of information acquired under the Act, the discovery procedures employed under *Evidence Code section 1040.* This section serves essentially the same purpose as the "intelligence information" exemption of *section 6254, subdivision (f)* -- the protection of confidential information. Under *section 1040*, however, a court will uphold disclosure only if the public interest in disclosure outweighs the necessity for preserving confidentiality (see *Shepherd v. Superior Court (1976) 17 Cal.3d 107, 124, 126 [130 Cal.Rptr. 257, 550 P.2d 161]*); in making this decision the court can consider the needs and interests of the particular litigants (*id., at p. 126*), and can in some cases impose protective orders to limit the use and dissemination of the information.

If, for example, the ACLU had sought to discover LEIU or IOCI records in a pending suit, the trial court, after ascertaining the bona fides of the request, could permit inspection under *section 1040* subject [*452] to protective limitations on use or publication of the information. Since the provisions of the Act do not "affect the rights of litigants . . . under the laws of discovery of this state" (§ 6260), the limitations on disclosure in *section 6254* would not restrict discovery sought in connection with such a civil action. In bringing a request under the Act, however, the ACLU stands in no better position than any member of the public who seeks to inspect LEIU or IOCI records for whatever reason he may have (cf. *Brown v. Federal Bureau of Investigation (2d Cir. 1981) 658 F.2d 71, 75)*, and is subject to the restrictions of *section 6254.*

We therefore conclude that the "intelligence information" exemption bars disclosure to the ACLU of personal identifiers, confidential sources, and confidential information relating to criminal activity. Although much of the information of the LEIU cards and the IOCI printouts is thus exempt from disclosure, the scope of the intelligence information exemption alone thus is insufficient to justify the defendants' blanket refusal of disclosure.

III.

(4) Defendants next argue that in the present case the burden of segregating exempt from nonexempt information is so great, and the utility of disclosing nonexempt information so minimal, that the court should invoke *section 6255* to bar any disclosure. [12] That section states that an agency can justify nondisclosure by showing "that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

12 The briefs of the Attorney General and amicus also suggest that if the court orders disclosure of any information from the LEIU cards, this would breach the LEIU agreements and result in departments of other jurisdictions refusing to provide information to the California Department of Justice. This consequence, they suggest, is one matter to be weighed by the court in evaluating the claimed exemption under *section 6255.* The record on appeal, however, is entirely insufficient for us to determine the effect, if any, of ordering disclosure limited to nonconfidential information upon the future exchange of data by law enforcement units.

Section 6255 has no counterpart in the federal Freedom of Information Act, and imposes on the California courts a duty which does not burden the federal courts -- the duty to weigh the benefits and costs of disclosure in each particular case. We reject the suggestion that in undertaking this task the courts should ignore any expense and inconvenience [*453] involved in segregating nonexempt from exempt information. *Section 6255* speaks broadly of the "public interest," a

phrase which encompasses public concern with the cost and efficiency of [***243] government. To refuse to place such items on the *section 6255* scales would make it possible for any person requesting information, for any reason or for no particular [**830] reason, to impose upon a governmental agency a limitless obligation. Such a result would not be in the public interest. [13]

13 We agree as a general principle with the language in *Northern Cal. Police Practices Project v. Craig (1979) 90 Cal.App.3d 116, 124 [153 Cal.Rptr. 173]*, that [HN5] "where nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the [Act] to make public records available for public inspection and copying unless a particular statute makes them exempt." The burden of segregating exempt from nonexempt materials, however, remains one of the considerations which the court can take into account in determining whether the public interest favors disclosure under *section 6255*.

After careful examination of the LEIU index cards *in camera*, we conclude that in the present case the public interest predominates against disclosure of the cards. It is clear that the burden of segregating exempt from nonexempt information on the 100 cards would be substantial. The cards do not indicate which material is confidential, might reveal a confidential source, or identify the subject of the report; in many instances defendants would have to inquire from the law enforcement department supplying the information. The utility of disclosure to the ACLU, on the other hand, is questionable: the deletion of personal identifiers will make it impossible for the ACLU to learn if a particular person is improperly listed as an associate of a criminal suspect (cf. fn. 2, *ante*); the deletion of confidential information will defeat its efforts to learn if any person is listed on the basis of inaccurate or unsubstantiated rumor.

At best, disclosure of nonexempt information from the cards in question might reveal certain generalities about the records, such as the proportion of persons listed with prior criminal records, the type of criminal activity of which they are suspected, etc. Conceivably such information might help to confirm or allay suspicions concerning the operation of criminal indexing systems. When this marginal and speculative benefit is weighed against the cost and burden of segregating the exempt and nonexempt material on the cards, we conclude that on the facts of this particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure [*454] of the record. [14] We therefore conclude that defendants, relying on *section 6255* of the Act, may refuse to disclose the subject index cards of the LEIU.

14 *Section 6255* requires the courts to look to "the facts of the particular case" in balancing the benefits and burdens of disclosure under the Act. Thus our decision against requiring disclosure is necessarily limited to the facts of this particular case; in another case, with different facts, the balance might tip in favor of disclosure of nonexempt information on the LEIU cards. If, for example, a person were to seek disclosure of only his own card, the diminished need to delete personal identifiers (the person in question presumably knows his own identity and that of his associates) and the reduced burden of determining confidentiality of sources or information when only a single card is involved might justify a court in requiring disclosure.

The IOCI printouts, however, stand on a different footing. All information on the printouts is derived from public records. Information so acquired is not confidential, and the public records in question are not confidential sources. Consequently, the task of segregating exempt material on the printouts reduces to one of excising the personal identifiers. This is a much less onerous burden than the deletion of personal identifiers, confidential information, and confidential sources from the LEIU cards. Weighing the burden of segregation against the benefit of disclosure of the IOCI printouts, the balance tips in favor of disclosure.

The portion of the judgment of the superior court requiring disclosure of the Interstate Organized Crime Index printouts is affirmed. The portion of that judgment requiring disclosure of the Law Enforcement Intelligence Unit index cards is reversed. The cause is remanded to the superior court for further proceedings consistent [**831] [***244] with this opinion. Each side shall bear its own costs on appeal. [15]

15 Plaintiff seeks attorney fees pursuant to *Government Code section 6259*. The trial court

should determine the fees to be awarded, taking into account not only the matters litigated on this appeal, but also the other items included in plaintiff's complaint (see fn. 4, *ante*).

CONCUR BY: RICHARDSON (In Part); BIRD (In Part)

DISSENT BY: RICHARDSON (In Part); BIRD (In Part)

DISSENT

RICHARDSON, J., Concurring and Dissenting. I concur in the majority opinion to the extent that it reverses that portion of the judgment below which required disclosure of the Law Enforcement Intelligence Unit index cards. I respectfully dissent, however, from the opinion insofar as it affirms the compelled disclosure of the Interstate Organized Crime Index printouts. In my view, both the index cards and the printouts are "intelligence information" which are absolutely exempt from disclosure under state law.

[*455] Unlike the federal Freedom of Information Act (81 Stat. 54) and its broadly *qualified* exemption for various investigatory records (see *ante*, p. 448), the California Public Records Act (*§ 6250 et seq. of the Gov. Code*, to which all statutory references relate) on its face contains an *absolute* exemption for "records of intelligence information" of all state and local law enforcement agencies. (*Id., § 6254, subd. (f).*)

The computer printouts at issue here clearly constitute "records of intelligence information" within the meaning of the California act. As the majority explains, these printouts disclose the names, criminal records, physical characteristics, associates, occupations and residences of each person suspected of organized crime activities. Although the printouts are compiled from information contained in various public records, the printouts themselves are used exclusively by law enforcement agencies to assist in their investigations. The majority holds that only the "personal identifiers" contained in the printouts are exempt from disclosure, and it imposes upon the agency the task of excising such personal identifiers from the remaining, discoverable information.

The California act, however, does not call for, or authorize, the disclosure or segregation of the nonconfidential or nonpersonal portion of the intelligence records of law enforcement agencies. Instead, by its terms the act protects the records in toto. On the assumption that plaintiff ACLU is interested merely in the "types of information" gathered by law enforcement agencies, no reason appears why a *blank* form of printout would not suffice. As Justice Paras carefully explained in his opinion for the Court of Appeal in this case, "The [blank] forms, which defendants have not refused to provide, fully describe the 'type of information' involved. Anything more than that is the information itself, which would add nothing but specific data relating to specific people . . . . But the specific data placed into the blank spaces is beyond question 'intelligence information,' expressly excluded by *section 6254, subdivision (f)*, from the scope of section 6253, subdivision (a)."

Agreeing with the foregoing reasoning, I would reverse the judgment in its entirety.

BIRD, C. J., Concurring and Dissenting. I respectfully dissent from that portion of the court's decision which denies disclosure of the LEIU cards.

[*456] James Madison once said, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." (Letter to W. T. Barry, Aug. 4, 1822, 9 The Writings of James Madison (Hunt ed. 1910) p. 103, quoted in *EPA v. Mink (1973) 410 U.S. 73, 110-111 [35 L.Ed.2d 119, 145, 93 S.Ct. 827]* (dis. opn. of Douglas, J.).)

Like James Madison, the California Legislature is of the view that "access to information concerning the conduct of the people's business is a fundamental and necessary [**832] right of every person in this state." (*Gov. Code, § 6250.*) [1] Thus, the California Public Records Act (or Act) was passed for [***245] the precise purpose of "increasing freedom of information" by giving the public "access to information in possession of public agencies." (See *Los Angeles Police Dept. v. Superior Court (1977) 65 Cal.App.3d 661, 668 [135 Cal.Rptr. 575].*) The Act is "intended to be construed liberally in order to further the goal of maximum disclosure in the conduct of governmental operations." (Final Rep., Assem. Statewide Info. Policy Com. [hereafter *Final Report*] (Mar. 1970) p. 145, appen. G, setting forth opn. Cal. Atty. Gen. No. 67/144 (1970).)

1 All statutory references hereafter are to the Government Code, unless specified otherwise.

In approving the government's efforts in the present case to keep the LEIU cards wholly secret, today's majority concludes that (1) the cards contain much information that is exempt from disclosure under *section 6254, subdivision (f)*; (2) segregation of the exempt material from the nonexempt would be a substantial burden on the government; and (3) this administrative inconvenience justifies withholding even the nonexempt portions of the LEIU cards, pursuant to *section 6255.*

The first two of these conclusions find no support whatsoever in the record. The government has never sought to demonstrate how much, if any, of the information on the LEIU cards is exempt from disclosure nor what the inconvenience or cost of deleting this information might be. Although the Public Records Act clearly places the burden of justifying nondisclosure on the agency desiring secrecy, [2] a majority of this court somehow waives this requirement and finds in favor of the government on these issues.

2 "*The agency shall justify* withholding any record *by demonstrating* that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (*§ 6255*, italics added; see also *Final Report, supra*, p. 12; *EPA v. Mink, supra, 410 U.S. at p. 93 [35 L.Ed.2d at p. 135]*.)

[*457] The court's third conclusion -- that administrative inconvenience is dispositive of these plaintiffs' claim of access to the records of their government -- threatens the very foundations of the Act. It represents a major triumph for bureaucratic inertia and secrecy, and it permits -- and even encourages -- state agencies to undermine the broad disclosure policies of the Act. Yet, as the Court of Appeal has held, the Public Records Act is "suffused with indications of a contrary legislative intent." (*Northern Cal. Police Practices Project v. Craig (1979) 90 Cal.App.3d 116, 123 [153 Cal.Rptr. 173]*.)

The federal Freedom of Information Act (or FOIA) [3] provides a right of public access to records of federal agencies, and, as today's majority agrees, the state and federal enactments "should receive a parallel construction.". (*Ante*, at p. 451.) However, the majority chooses to ignore the unanimous interpretation of the FOIA that "equitable considerations of the costs, in time and money, of making records available for examination do not supply an excuse for non-production." (See, e.g., *Sears v. Gottschalk (4th Cir. 1974) 502 F.2d 122, 126*, and cases cited.)

3 *5 United States Code section 552.*

I remain unpersuaded.

I.

The California Public Records Act was enacted against a "background of legislative impatience with secrecy in government . . . ." *(53 Ops.Cal.Atty.Gen. 136, 143 (1970).)* The Legislature had long been attempting to "formulate a workable means of minimizing secrecy in government." (*Id., at p. 140*, fn. omitted.) The basic law "was vague and had been interpreted by the courts in a restrictive fashion." (*Final Report, supra*, p. 7.)

Moreover, it "appeared . . . to be creating (or perhaps merely reinforcing) an attitude of reluctance on the part of various administrative officials to make records in their [**833] custody available for public inspection." (53 Ops.Cal.Atty.Gen., *supra*, p. 143.) Those limited reform efforts that managed to become law -- such as the Brown Act of 1953 [4] -- were insufficient to address the problems. What was needed was a comprehensive statute governing access to information. [***246] (Schaffer et al., *A Look at the California Records Act and Its Exemptions* (1974) 4 Golden Gate L.Rev. 203, 212.)

4 Statutes 1953, chapter 1588, page 3269.

[*458] Such an enactment was the California Public Records Act. (§§ 6250-6265.) The tone of the Act was set by the broad language used to define "public records." (§ 6252, subd. (d).) "This definition is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed." (*Final Report, supra*, p. 9.)

Like the federal Freedom of Information Act upon which it was modeled, "the general policy of the [Public Records Act] favors disclosure. Support for a refusal to disclose information must be found, if at all, among the

specific exceptions to the general policy that are enumerated in the Act.'" (*Cook v. Craig (1976) 55 Cal.App.3d 773, 781 [127 Cal.Rptr. 712]*, citation omitted, quoting *State of California* ex rel. *Division of Industrial Safety v. Superior Court (1974) 43 Cal.App.3d 778, 783 [117 Cal.Rptr. 726].*) The burden of establishing that an exception applies lies with the agency resisting disclosure. (See *ante*, fn. 2.)

Even where the Public Records Act permits nondisclosure, it does not *require* withholding the requested information. (*Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 656 [117 Cal.Rptr. 106].*) The Act sets forth "the minimum standards" for access to government information, and generally "a state or local agency may adopt requirements for itself which allow greater access to records." (§ 6253.1; see also *Final Report, supra*, p. 9.)

Moreover, the fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document. (*Northern Cal. Police Practices Project v. Craig, supra, 90 Cal.App.3d at p. 123.*) Section 6257 of the Act specifically provides that "[any] reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law."

Relying on the Public Records Act, plaintiff ACLU has sought to examine a random sampling of the LEIU cards [5] maintained by the [*459] California Department of Justice (or Department) ostensibly in connection with its function of "[gathering], analyzing and storing intelligence pertaining to organized crime." (§ 15025, subd. (a).) The ACLU's concern stems from mid-1970's revelations on the national level of law enforcement abuses in the acquisition and maintenance of information for surveillance purposes. The fears expressed at that time have increased as a result of the Department's recent publication of a report purportedly relating to organized crime and terrorism. (Rep.Cal.Atty.Gen. (May 1981) Organized Crime in Cal. -- 1980, pt. 2, Terrorism.) The report suggests that the Department views its duty to monitor organized crime activities as covering "activities of domestic extremist groups in the form of rallies and demonstrations." (*Id.*, p. 1.)

5 The ACLU agrees that all information on the LEIU cards which identifies an individual should be deleted prior to disclosure.

The ACLU also sought a similarly edited sampling of entries in the now-defunct IOCI system. Since I agree with the majority that this information should be released to plaintiff, I do not discuss that aspect of the case further.

Thus, the goals of the ACLU suit include testing the degree to which units in the Department of Justice engage in political surveillance under the guise of obtaining information pertaining to law enforcement and "determining whether the conduct of [the Department] complies with law . . ."

The Department has refused to disclose any portion of the LEIU cards. It asserts that two provisions of the Public Records Act authorize its actions. Primary reliance is placed on *subdivision (f) of section 6254* [**834] (Exemption (f)), which permits the withholding of "records of intelligence information . . . of . . . the office of the Attorney General and the Department of Justice, and any state or local police agency . . . ." The Department also seeks to invoke the provision of *section 6255* authorizing nondisclosure when "on the facts of the particular case the public interest served by not making [***247] the record public clearly outweighs the public interest served by disclosure of the record."

Throughout these proceedings, the Department has taken the position that these exemptions protect the LEIU cards in toto. It has adduced no evidence to establish a confidential source for any specific information on any of the cards. Moreover, while occasionally asserting that segregation of exempt from nonexempt information would be "burdensome," the Department has offered no testimony, affidavit, or other evidence of the extent of this alleged burden.

Following meticulously conducted proceedings *in camera* -- including examination of the LEIU cards themselves -- the trial court ruled in favor [*460] of disclosure except for "those portions [of the cards] which show and disclose personal identifiers and confidential sources." It found that disclosure of the nonexempt material "will inform interested members of the public of the type of information which the [Department] [develops] and [gathers]." It further found the public interest served by disclosure to be "the need to insure that [the Department is] complying with the Constitution and laws of the United States and the State of California . . . and to defend and protect constitutional rights by guarding against unlawful invasions of privacy and

personal security by over-zealous spying, surveillance and covert activities."

I agree with the majority that the trial court's interpretation of the Public Records Act's exemption for "records of intelligence information" was too narrow. Exemption (f) permits withholding not only information which might identify confidential sources but also "confidential information furnished only by the confidential source" to "a criminal law enforcement authority in the course of a criminal investigation." (See *5 U.S.C. § 552 (b)(7)(D)* [hereafter Exemption 7(D) of the FOIA].)

This conclusion is supported by a close reading of Exemption (f). By the plain wording of the Public Records Act, the Legislature sought to protect confidential "information," not merely the identity of confidential sources. Moreover, in providing within the same subdivision for disclosure of certain facts to victims or their representatives, the Legislature specifically exempted the "statements" and "names and addresses" of confidential informants. This indicates that the Legislature was aware of a distinction between statements and identity and that its choice of the broad term "intelligence information" was intended to encompass more than either of these two ideas separately.

Reading Exemption (f) as protecting confidential sources and information brings this portion of the California Act into close alignment with Exemption 7(D) of the FOIA. (See, e.g., *Duffin* v. *Carlson* (D.C.Cir. 1980) *636 F.2d 709, 712*.) I agree that the two exemptions should normally receive a "parallel construction." (Maj. opn., *ante*, at p. 451.)

However, I am perplexed by one reason tendered by the majority for interpreting Exemption (f) in this fashion. Here, it is asserted that the Public Records Act should be interpreted in light of the "fact" that "information may be sought for less noble purposes" than those of the ACLU in this case. (*Ante*, p. 451.) This reasoning is completely untenable.

[*461] The majority conjures up the possibility that a disclosure request may be made for ignoble purposes and yet fails even to consider that bureaucracies may have improper reasons of their own for refusing disclosure.

Secrecy is not required by the Public Records Act; disclosure is virtually always permitted. (§ 6253.1.) Thus, it is well recognized that disclosure may be resisted not because of a genuine need for secrecy, but [**835] out of fear of "[arousing] public opinion against the policies the agency is determined to employ." (See Schaffer et al., *supra*, 4 Golden Gate L.Rev. at p. 209.) A governmental agency may resist disclosure merely because "from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure." (*Vaughn* v. *Rosen* (D.C.Cir. 1973) [***248] 484, 820, 826.) In entirely ignoring these obvious teachings of history, the majority blinds itself to the very need for a Public Records Act in the first place.

Moreover, the majority thwarts one of the Legislature's avowed purposes in passing the Act, i.e., to "invalidate[]" court decisions which had interpreted the prior law "in a restrictive fashion." (*Final Report, supra*, p. 7.)

In an Attorney General's opinion incorporated into the *Final Report*, it was said to be "clear" that the Act "is intended to be construed liberally in order to further the goal of maximum disclosure in the conduct of governmental operations." (53 Ops.Cal.Atty.Gen., *supra*, at p. 143; *Final Report, supra*, at p. 145.) This source also indicated that the "same historical evidence which compels the conclusion that the . . . Act should be construed broadly also compels the conclusion that [the exemptions] must be construed strictly so as not to interfere with the basic policy of the act." (53 Ops.Cal.Atty.Gen., *supra*, p. 143; *Final Report, supra*, at p. 145.)

The federal cases interpreting the FOIA are all in agreement with our Legislature and our Attorney General. The federal courts have universally accepted the proposition that the FOIA "creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed." (*Bristol-Myers Company v. F. T. C. (D.C.Cir. 1970) 424 F.2d 935, 938*, fn. omitted, cert. den., *400 U.S. 824 [24 L.Ed.2d 52, 91 S.Ct. 46]*; see also *Dept. of Air Force v. Rose (1976) 425 U.S. 352, 361, 366 [48 L.Ed.2d 11, 21, 24, 96 S.Ct. 1592]*; *Vaughn* v. *Rosen, supra*, 484 F.2d 820, 823, cert. den., *415 U.S. 977* [*462] *[39 L.Ed.2d 873, 94 S.Ct. 1564]*.) This, of course, is the very same Freedom of Information Act whose "judicial construction and legislative history . .

. serve to illuminate the interpretation of its California counterpart." (Maj. opn., *ante*, at p. 447.)

While I agree with the majority as to the scope of Exemption (f), I cannot subscribe to the dictum which would construe the disclosure provisions of the Act in a one-sided manner, blind to the countervailing considerations. Such statutory construction might accord with those justices' view of good policy, but it does not conform to that which is supposed to be paramount -- the Legislature's intent.

II.

Having determined the proper scope of Exemption (f), the majority proceeds to uphold the Department's claim of secrecy under the balancing test of *section 6255*. (See *ante*, fn. 2.) It rules that the cost and administrative inconvenience of segregating exempt from nonexempt information on the LEIU cards justify the refusal to disclose any information contained in these public records. This conclusion is absurd. It violates the terms and basic concerns of the Public Records Act, the prior court decisions of this state, the "parallel" Freedom of Information Act and the cases interpreting it, as well as common sense.

It is inconceivable that the Legislature, in enacting the *section 6255* balancing test, intended to permit administrative cost and inconvenience to be dispositive of a request for access to public records. Nowhere in *section 6255* or the Act as a whole is such an intention manifested.

The specific exemptions of *section 6254* are of considerable aid in ascertaining the Legislature's conception of "the public interest served by not making [a] record public . . . ." as used in *section 6255*. [6] However, none of these provisions displays a [**836] solicitude for the inconvenience or cost to bureaucracies of affording access to public records. The concerns articulated relate to protection of personal privacy, confidential information, and agency deliberative processes, not bureaucratic convenience.

> 6 See Note, *The California Public Records Act: The Public's Right of Access to Governmental Information* (1976) 7 Pacific L.J. 105, 119.

Further evidence in this regard can be found in the final sentence of section 6257. There, it is required that "[*any*] reasonably segregable [*463] portion of a record *shall be provided* . . . after deletion of the portions which are exempt by law." (Italics added.) [***249] It is difficult to see how the Legislature could have been clearer in requiring the production of *any* such nonexempt material. [7]

> 7 The majority opinion hints in a footnote that nonexempt information is not "reasonably segregable" if the burden of segregation is great. (*Ante*, fn. 13, p. 453.) This suggestion does not withstand analysis.
>
> The "reasonably segregable" provision of the California Act was lifted nearly verbatim from the federal Freedom of Information Act. (Cf., final sentence of *5 U.S.C. § 552(b)*.) The federal provision, in turn, has been interpreted to require disclosure of any nonexempt material "if it is at all intelligible -- unintelligibility indicating, of course, that it is not 'reasonably' segregable from the balance." (U.S. Dept. Justice, Atty. Gen. Memo. on 1974 Amends. to Freedom of Information Act (Feb. 1975), in Sourcebook: Legislative History, etc., Freedom of Information Act and Amendments of 1974 (94th Cong., 1st Sess., 1975) pp. 524-525.)
>
> As will be shown hereafter, the federal cases have uniformly rejected the position of the majority that administrative burden can be dispositive of a disclosure request under the FOIA.

The Legislature clearly was aware that some requests for information under the Public Records Act would require an agency to (1) "search for and collect . . . records from . . . establishments that are separate from the office processing the request"; (2) "search for, collect, and appropriately examine a voluminous amount of separate and distinct records"; and (3) consult with "another agency . . . or among two or more components of the agency." (See § 6256.1.) The only concession granted to a bureaucracy by the Legislature in this regard was that such "unusual circumstances" would permit the agency a maximum of 10 extra working days within which to respond to the request. (*Ibid.*) There is not the slightest suggestion that such circumstances ipso facto justify a refusal to disclose.

If any further evidence of legislative intent is

necessary, it can be found in *section 6250*, where the Legislature "declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Today's majority attributes to the Legislature an intent to permit this "fundamental and necessary right" to be overcome by a mere allegation of bureaucratic inconvenience and cost. Once again, this is patently absurd.

In addition to these direct indications of legislative intent, simple logic and experience dictate that the public's right to know not be overriden by claims of bureaucratic inconvenience. The history of freedom of information laws, both in this state and on a national level, is largely [*464] the history of bureaucratic resistance to revealing agency operations. If a disclosure request may be defeated by an agency's showings of administrative cost and burden, then the very foundations of the Public Records Act are undermined.

Initially, uncertainty is injected by this court into an act where clarity was intended. The result will surely be that agencies will be emboldened to resist disclosure requests. This is contrary to the Legislature's intent. Compliance was to be encouraged. The likely result of today's decision is the multiplication of contested court proceedings and the end of voluntary settlements.

Even more important, the bureaucracy -- rather than the Legislature, the courts, or the people -- will be empowered to determine what records will be revealed. It is the bureaucracy that decides in what form and where to keep its records. By commingling exempt and nonexempt information and spreading out responsibility for the compilation and storage of records, the agency can be assured of a tenable claim of exemption under *section 6255*. At the very least, already wary agencies are discouraged from creating "internal procedures that will assure that disclosable information [**837] can be easily separated from that which is exempt." (See *Vaughn* v. *Rosen, supra,* 484 F.2d at p. 828; see also *Irons v. Gottschalk (D.C.Cir. 1976) 548 F.2d 992, 996*, cert. den., *434 U.S. 965 [54 L.Ed.2d 451, 98 S.Ct. 505].*)

Finally, as modern society becomes more complex, so do the issues which confront us and the agencies that are supposed to serve us. At the same time, our demands and [***250] expectations of government continue to expand. Thus, colorable claims of administrative burden will increase. As a result, constrained by this court's holding that access to public records may be denied because of bureaucratic burdens, the Public Records Act will be reduced to an anachronism, applicable to trivialities or events no longer important, but incapable of ensuring the public knowledge necessary to the proper functioning of a democracy.

It is, therefore, not surprising that the courts have unanimously taken a position contrary to that of today's majority. "Undoubtedly, the requirement of segregation casts a tangible burden on governmental agencies and on the judiciary. Nothing less will suffice, however, if the underlying legislative policy of the [Act] favoring disclosure is to be implemented faithfully. If the burden becomes too onerous, relief must be [*465] sought from the Legislature." (*Northern Cal. Police Practices Project v. Craig, supra, 90 Cal.App.3d at p. 124.*)

The federal cases are in complete accord. "[Equitable] considerations of the costs, in time and money, of making records available for examination do not supply an excuse for non-production." (*Sears v. Gottschalk, supra, 502 F.2d at p. 126.*) "Allowing such a defense would undercut the Act's broad policy of disclosure." (*Ferguson v. Kelly (N.D.Ill. 1978) 455 F.Supp. 324, 326.*) Even a cursory sampling of cases involving the Freedom of Information Act reveals that the federal act is used to obtain access to enormous quantities of documents from which an agency must segregate exempt information. The request in the present case for access to 100 small LEIU cards pales by comparison. (See, e.g., *Pratt v. Webster (D.C.Cir. 1982) 673 F.2d 408* [FOIA used to obtain access to edited versions of over 1,000 documents, totalling thousands of pages]; *Reporters Committee for Freedom of the Press v. Sampson (D.C.Cir. 1978) 591 F.2d 944, 949, fn. 17* [FOIA available to obtain access to the "massive volume of materials" in the presidential papers of former President Nixon]; *Diapulse Corp. of Am. v. Food & D. Admin. of Dept. of H.E.W. (2d Cir. 1974) 500 F.2d 75* [FOIA used to obtain access to thousands of documents, the collection and editing of which would take four to six days].)

These federal practices and cases should be highly persuasive to those members of this court who have signed today's majority opinion. Their opinion is replete with statements acknowledging that the Public Records Act "was modeled upon" the federal act and "should receive a parallel construction." (See, e.g., *ante*, at pp.

449, 451.) Yet, federal authority is conspicuously absent when they decree that bureaucratic inconvenience may prevail over the people's "fundamental and necessary right" to know.

I am constrained once again to disagree.

III.

Even if the administrative burden to an agency could be dispositive of a request for information under the Act, I would be hard pressed to comprehend the conclusion of the majority that as a matter of law, the LEIU cards are exempt from disclosure. The majority reasons that (1) "much of the information of the LEIU cards . . . is . . . exempt from disclosure"; (2) the "burden of segregating exempt from nonexempt information [*466] on the 100 cards would be substantial"; and (3) on balance "the public interest predominates against requiring disclosure" of the nonexempt information. (Maj. opn., *ante*, at pp. 451-453.) The first two of these conclusions are wholly unsupported by the record; the third is a serious misapplication of the law.

The Department has never even attempted to establish how much, if any, of the information on the LEIU cards is exempt from disclosure under a proper interpretation of Exemption (f). Rather, it has consistently [**838] taken the position that all of the information on those cards per se constitutes "records of intelligence information." [***251] Since this court has correctly rejected this extreme position (*ante*, at pp. 449-450), I am at a loss to discover the source of its conclusion that "much of the information of the LEIU cards" is exempt under a proper interpretation of Exemption (f). Indeed, the only evidence on this point suggests there is little "intelligence information." A high ranking Justice Department official testified in passing that, "L.E.I.U. is just an index anyway . . . . *It does not have hard intelligence.* L.E.I.U. does not contain that." [8] (Italics added.)

> 8 The bulk of this official's testimony, like that of the other witnesses below, involved merely the authentication of documents to be examined by the court.

There are similar problems with the court's conclusion regarding the "substantial" burden of segregation. Here, at least, the Department has +proffered an allegation that segregation is "burdensome," but its claim is conclusory and supported by *no* facts. "[Bare] conclusory allegations [do] not suffice to establish an essential fact concerning the applicability of an FOIA exemption." (*Irons v. Bell (1st Cir. 1979) 596 F.2d 468, 471.*) Agency claims that an exemption applies "may or may not be accurate." (*Vaughn* v. *Rosen, supra*, 484 F.2d at p. 824.) Thus, "courts will simply no longer accept conclusory and generalized allegations of exemptions . . . ." (*Id., at p. 826*, fn. omitted.)

It is the court, not the agency, which finally determines the applicability of an exemption. (See *§ 6259*; *Black Panther Party v. Kehoe, supra, 42 Cal.App.3d at p. 657*; see also, e.g., *Lane v. United States Dept. of Justice (3d Cir. 1981) 654 F.2d 917, 922.*) Without evidence, however, a court obviously cannot make that determination. Neither this court nor the trial court has been presented with such evidence.

Given this state of the record and the fact that the agency bears the burden of establishing the applicability of an exemption (see *ante*, fn. [*467] 2), it is hard to fault the trial court for ordering disclosure. How this court manages to arrive at a contrary conclusion as a matter of law remains a mystery.

It bears noting that the interpretation given today to Exemption (f) was not the interpretation used at the trial proceedings below. Moreover, the Department, relying on its erroneous reading of Exemption (f), tendered no evidence as to how much information on the LEIU cards would disclose or is attributable to a confidential source, as this court today construes those terms. The proper disposition of this aspect of the appeal would be to remand the case for further proceedings in light of the interpretation today given Exemption (f) and *section 6255*.

One final point. The *section 6255* balancing test permits the withholding of records only when "the public interest served by not making the record public *clearly* outweighs the public interest served by disclosure of the record." (*§ 6255*, italics added.) The word "clearly" is significant. The Assembly Information Policy Committee itself emphasized the word in its *Final Report*: "A public agency may only refuse to disclose the contents . . . of a public record, if it can . . . show that the public interest *clearly* is on the side of non-disclosure . . . ." (*Final Report, supra*, p. 12; accord 53 Ops. Cal.Atty.Gen., *supra*, at p. 148.)

In light of this heavy burden on those who seek to justify nondisclosure, the majority's conclusion that the public interest predominates against disclosure is even more indefensible. It represents no more than lip service to the test of *section 6255.* It seems to present yet another example of the roughshod manner in which the majority ride over the commands of the Legislature and the "fundamental and necessary right of every person in this state" to information about his or her government. (See *§ 6250.*)

CBS, INC., Plaintiff and Appellant, v. SHERMAN BLOCK, as Sheriff, etc., et al., Defendants and Appellants

L.A. No. 32029

Supreme Court of California

42 Cal. 3d 646; 725 P.2d 470; 230 Cal. Rptr. 362; 1986 Cal. LEXIS 270

October 9, 1986

PRIOR HISTORY: Superior Court of Los Angeles County, No. C-459176, Harry L. Hupp, Judge.

DISPOSITION: Therefore, this cause is remanded to the trial court for further proceedings consistent with this opinion. The costs on appeal are to be borne by the defendants.

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN1] See *Cal. Gov't Code § 6258.*

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN2] See *Cal. Gov't Code § 6259.*

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
[HN3] Traditionally, when deciding whether or not to issue a preliminary injunction, trial courts must evaluate two interrelated factors. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN4] The ruling on an application for a preliminary injunction does not constitute an adjudication of the ultimate rights in controversy. On appeal the question becomes whether the trial court abused its discretion when it considered both factors. If the appellate court finds that the trial court correctly determined at least one of the two factors, it may affirm the trial court's order.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN5] California Public Records Act, *Cal. Gov't Code § 6250 et seq.*, states in pertinent part: access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN6] In formulating the California Public Records Act (PRA), *Cal. Gov't Code § 6250 et seq.*, the legislature had

long been attempting a workable means of minimizing secrecy in government. The PRA was modeled on the federal Freedom of Information Act (Act), *5 U.S.C.S. § 552 et seq.*, and was passed for the explicit purpose of increasing freedom of information by giving the public access to information in possession of public agencies. Maximum disclosure of the conduct of governmental operations was to be promoted by the Act.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN7] Two exceptions to the general policy of disclosure are set forth in the California Public Records Act (Act), *Cal. Gov't Code § 6250 et seq.*, and *§ 6254* lists 19 categories of disclosure-exempt material. These exemptions are permissive, not mandatory. The Act endows the agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN8] The penultimate sentence of California Public Records Act, *Cal. Gov't Code § 6254* states: Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law. In addition, § 6253.1 provides in pertinent part that a state or local agency may adopt requirements for itself which allow greater access to records .

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN9] California Public Records Act, *Cal. Gov't Code § 6255* establishes a catch-all exception that permits the government agency to withhold a record if it can demonstrate that on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN10] See California Public Records Act, *Cal. Gov't Code § 6255*.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN11] California Public Records Act, *Cal. Gov't Code § 6257* specifically provides that any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law. The fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document.

Evidence > Privileges > Government Privileges > General Overview
[HN12] The privilege of *Cal. Evid. Code § 1040(b)(2)* must be applied conditionally on a clear showing that disclosure is against the public's interest.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A television and broadcasting company filed a request, under the California Public Records Act (*Gov. Code, § 6250 et seq.*) to inspect and copy applications submitted to and licenses issued by a county sheriff authorizing possession of concealed weapons by individuals. The information was sought in connection with an investigation of possible abuses by officials in the exercise of their statutorily delegated discretion (*Pen. Code, § 12050*) to issue such licenses. When the request was denied, the broadcasting company filed a motion to obtain disclosure of the records under *Gov. Code, §§ 6258, 6259*. The trial court directed the sheriff to disclose the names and certain identifying information concerning most of the individuals who had been granted licenses, but denied plaintiff's access to any data pertaining to certain individuals and refused to require disclosure of the applications for licenses filed with the county. (Superior Court of Los Angeles County, No. C-459176, Harry L. Hupp, Judge.)

The Supreme Court reversed. The court held that, having invoked the Public Records Act (*Gov. Code, § 6255*) as a basis for denial of access to the requested materials, defendant county officials were required to demonstrate that the public interest served by not making the license records sought public clearly outweighed the public interest served by disclosure of such records and that defendants failed to meet the prescribed burden. The court held that the trial court committed error in ordering disclosure of most of the licenses then in effect with

certain restrictions but denying plaintiff's request for copies of the license applications. The relief granted was inadequate in view of the purpose for which the information was sought, in that, without the applications that accompanied the licenses and that set forth the reasons why each license was requested, the public was not in a position to judge whether the responsible county officer had properly exercised his discretion in issuing the licenses. (Opinion by Bird, C. J., with Broussard, Reynoso, Grodin, JJ., and McClosky (Eugene), J., * concurring. Separate dissenting opinion by Mosk, J., with Panelli, J., concurring.)

* Associate Justice, Court of Appeal, Second District, assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Appellate Review § 127--Review--Scope and Extent. -- --On review of a trial court order in a proceeding to obtain inspection and disclosure of public records, pursuant to *Gov. Code, §§ 6258, 6259*, the reviewing court is required to conduct an independent review of the trial court's statutory analysis with respect to balancing the burdens and costs of disclosure of the requested information. Factual findings made by the trial court will be upheld if based on substantial evidence.

(2) Records and Recording Laws § 12--Inspection of Public Records--Denial of Access to or Inspection of Records--Burden of Establishing Justification Therefor. -- --The Public Records Act (*Gov. Code, § 6250 et seq.*) was enacted for the explicit purpose of increasing freedom of information by giving the public access to information in possession of public agencies, and thus a county sheriff was not justified, under *Gov. Code, § 6255*, the "catch-all" exception to the general policy of disclosure set forth in the statute, in refusing to release records of licenses to carry concealed weapons, issued by the county, and applications for renewal of such licenses. The sheriff's concern that release of the information would increase the vulnerability of the licensees was conjectural at best, and the concern for substantial privacy of the licensees was not warranted, since the information contained in the records had been voluntarily given to the sheriff by the applicants and sworn to be factually true.

(3) Records and Recording Laws § 12--Inspection of Public Records--County License Records. -- --Rejection of a county sheriff's claim for exemption from disclosure to a television and broadcasting company of records pertaining to licenses to carry concealed weapons, under *Gov. Code, § 6255*, the "catch-all" exemption to the general policy of disclosure of public records under the Public Records Act (*Gov. Code, § 6250 et seq.*), on the ground that the public interest weighed in favor of disclosure as opposed to nondisclosure, required rejection of a claim for exemption made by the sheriff with respect to the same records, under *Gov. Code, § 6254, subd. (k)*, exempting records, disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege, since the same weighing process is involved under both provisions. Rejection of the sheriff's claim for exemption from disclosure of the records sought, based on *Evid. Code, § 1040*, which creates a privilege for official information acquired in confidence, under certain circumstances, was mandated for the same reason.

(4) Records and Recording Laws § 12.5--Inspection of Public Records--Licenses to Carry Concealed Weapons. -- --In an action to obtain disclosure of public records, pursuant to *Gov. Code, §§ 6258, 6259*, in which a television and broadcasting company, in connection with an investigation of possible official abuse, sought to inspect and copy licenses to carry concealed weapons issued by a county, and applications for renewal thereof, the trial court erred in ordering disclosure of identifying information as to most of the licenses in effect at the time but denying plaintiff's request for copies of the license applications, since the relief granted was inadequate in light of the purpose for which the information was sought. Without the applications that accompanied the licenses, each of which contained a statement by the applicant as to the purpose for which the license was requested, the public could not judge whether the county sheriff had properly exercised his discretion in issuing the licenses.

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JUDGES: Opinion by Bird, C. J., with Broussard, Reynoso, Grodin, JJ., and McClosky (Eugene), J., * concurring. Separate dissenting opinion by Mosk, J., with Panelli, J., concurring.

* Associate Justice, Court of Appeal, Second District, assigned by the Chairperson of the Judicial Council.

OPINION BY: BIRD

OPINION

[*648] [**471] [***363] Are the press and public prohibited from obtaining the information contained in the application for and the license to possess a [*649] concealed weapon under the California Public Records Act (*Gov. Code, § 6250 et seq.*, hereafter the PRA or the Act) even though this information was open to public inspection from 1957-1968 and the Act did not specifically exempt this information from disclosure? [1]

1 Unless otherwise indicated, all statutory references are to the Government Code.

I.

This case arose when CBS, Inc. (CBS) filed a request under the PRA, in July of 1983, to inspect and copy the applications submitted to and licenses issued by the Los Angeles County Sheriff authorizing the possession of concealed weapons. CBS sought the information in connection with an investigation of possible abuses by officials in the exercise of their statutorily delegated discretion to issue licenses for concealed weapons. (See *Pen. Code, § 12050.*)

According to the reporter's transcript and the court records it appears that only 35 concealed weapon licenses were issued in Los Angeles County. There are approximately 7 million residents of Los Angeles County.

All of the applications made were for a renewal. For the majority of these, no reason for issuance was given or a one sentence explanation -- "Needed for protection of life and property" -- was used.

The sheriff refused to release any of the applications or licenses. In response, CBS filed a motion for a preliminary injunction [2] detailing the reasons it desired the requested material. The hearing on CBS's motion [**472] [***364] was held in August of 1983. After reviewing the records in camera, the trial judge noted that the reasons stated for desiring a license were essentially "pro forma" and, therefore, ordered disclosure of most of the licenses then in effect with the proviso that the home addresses of the licensees be deleted. The court denied CBS's request for copies of the applications. Both sides have appealed.

2 [HN1] *Section 6258* provides in pertinent part that: "Any person may institute proceedings for injunctive or declarative relief in any court of competent jurisdiction to enforce his right to inspect or to receive a copy of any public record or class of public records under this chapter."

Appellants have conceded that the applications and licenses in question fall within the broad definition of "public records." (*§ 6252, subd. (d).*)

II.

(1) The question presented by this appeal is whether the trial court erred in granting partial relief to CBS on its motion for disclosure under *sections 6258* and *6259*.

[*650] [HN2] *Section 6259* provides in pertinent part: "(a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose

the public record or show cause why he should not do so. The *court shall decide the case* after examining the record in camera, if permitted by *subdivision (b) of section 915 of the Evidence Code*, papers filed by the parties and such oral argument and additional evidence as the court may allow. [para.] (b) If the court finds that the public official's decision to refuse disclosure is not justified under the provisions of *Section 6254* or *6255*, he shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure." (Italics added.)

Although *section 6258* speaks in terms of injunctive relief (see, *ante*, p. 649, fn. 2) and the application contemplated by the statute may be one for a preliminary injunction, there is nothing "preliminary" about the trial court's order here. [3] As the italicized phrase of *section 6259* indicates, the Act does not provide for a trial on the merits. These conclusions are buttressed by the 1984 amendment to *section 6259*, effective as to actions filed on or after January 1, 1985, which provides that such orders are not appealable, but are subject to immediate writ review.

> 3 However, we note that [HN3] traditionally, when deciding whether or not to issue a preliminary injunction, trial courts must evaluate two interrelated factors. (*Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286 [219 Cal.Rptr. 467, 707 P.2d 840]*.) "'The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. [Citations.]'" (*Cohen v. Board of Supervisors, supra, 40 Cal.3d 277, 286*, quoting *IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69-70 [196 Cal.Rptr. 715, 672 P.2d 121]*; accord *Robbins v. Superior Court (1985) 38 Cal.3d 199, 206 [211 Cal.Rptr. 398, 695 P.2d 695]*.)[HN4]
>
> The ruling on an application for a preliminary injunction does not constitute an adjudication of the ultimate rights in controversy. (*Robbins v. Superior Court, supra, 38 Cal.3d at p. 218.*) Consequently, on appeal the question becomes whether the trial court abused its discretion when it considered *both* factors. If the appellate court finds that the trial court correctly determined at least one of the two factors, it may affirm the trial court's order. (*Cohen v. Board of Supervisors, supra, 40 Cal.3d at pp. 286-287.*)

Sections 6250 to 6265, which govern disclosure of public records, provide little guidance on the question of the standard of review on appeal. The cases are similarly silent on this point. However, the analysis in this court's decision in *American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440 [186 Cal.Rptr. 235, 651* [***365] *P.2d 822]* (hereafter *ACLU*) clearly indicates that the standard is one of independent review. In that decision, [*651] this court reexamined the records, balanced the burdens and costs of disclosing the requested information, and affirmed in part the trial court's judgment requiring disclosure of nonexempt information. (*ACLU, supra, 32 Cal.3d 440, 443-444.*) Accordingly, [**473] this court must conduct an independent review of the trial court's statutory balancing analysis. Factual findings made by the trial court will be upheld if based on substantial evidence.

III.

(2) Government files hold huge collections of information. These files can be roughly divided into two categories: (1) records detailing public business and official processes; and (2) records containing private revelations. Statutory and decisional authority on public record disclosure reveals two fundamental and frequently competing societal concerns that result from the commingling of public and personal information. [4]

> 4 Two years after the enactment of the PRA, a California legislative committee observed ". . . many who have championed the cause of privacy leave unclear the statutory boundary where the personal right of privacy and the public's right to know the workings of its government meet. Those who know the complexity of government records policy and practice will realize that these values do not always remain separate and distinct." (Assem. Statewide Info. Policy Com., Final Rep. (Mar. 1970) p. 21, 1 Assem. J. Appen. (1970) (hereafter *Final Report*).)

Implicit in the democratic process is the notion that

government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. [5] However, a narrower but no less important interest is the privacy of individuals whose personal affairs are recorded in government files. [6]

5 [HN5] In California, access to government records has been deemed a fundamental interest of citizenship. *Section 6250* of the PRA states in pertinent part: "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

6 Recognition of the importance of preserving individual privacy is also evident in *section 6250*. The PRA begins with the phrase: "In enacting this chapter, the Legislature [is] mindful of the right of individuals to privacy . . . ." (*§ 6250.*)

When the PRA was enacted in 1968, "'[the] [HN6] Legislature had long been attempting to "formulate a workable means of minimizing secrecy in government."'" (*San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 772 [192 Cal.Rptr. 415]*; quoting *ACLU, supra, 32 Cal.3d 440, 457.*) The PRA was modeled on the federal Freedom of Information Act (*5 U.S.C. § 552 et seq.*; *Cook v. Craig (1976) 55 Cal.App.3d 773, 781 [127 Cal.Rptr. 712]*) and was passed for the explicit purpose of "increasing freedom of information" by giving the public "access to information in possession of public agencies" (*Los Angeles Police Dept. v. Superior Court (1977) 65 Cal.App.3d 661, 668 [135 Cal.Rptr. 575]*). Maximum disclosure of the [*652] conduct of governmental operations was to be promoted by the Act. *(53 Ops.Cal.Atty.Gen. 136, 143 (1970).)*

[HN7] Two exceptions to the general policy of disclosure are set forth in the Act. *Section 6254* lists 19 categories of disclosure-exempt material. These exemptions are permissive, not mandatory. The Act endows the agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure. [7] (*Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 656 [117 Cal.Rptr. 106].*)

7 [HN8] The penultimate sentence of *section 6254* states: "Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." (See also, *Final Report, supra*, p. 11.)

In addition, section 6253.1 provides in pertinent part that "a state or local agency may adopt requirements for itself which allow greater access to records . . . ."

In addition to these express [HN9] exceptions, *section 6255* establishes a catch-all exception that permits the government agency to withhold a record if it can demonstrate that "on the facts of a particular case the public interest served by not making the record public *clearly outweighs* the public interest [**474] [***366] served by disclosure of the record." [8] (Italics added.)

8 [HN10] *Section 6255* provides in full: "The *agency* shall justify withholding any record by *demonstrating* that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (Italics added.)

Defendants contend that they have met the burden of proving that the records of applications and licenses for concealed weapons fall within the catch-all exception. They argue that releasing this information will allow would-be attackers to more carefully plan their crime against licensees and will deter those who need a license from making an application.

Defendants' concern that the release of the information to the press would increase the vulnerability of licensees is conjectural at best. [9] The prospect that somehow this information in the hands of the press will increase the danger to some licensees cannot alone support a finding in favor of non-disclosure as to all. A mere assertion of possible endangerment does not "clearly outweigh" the public interest in access to these records. [HN11] Moreover, *section 6257* specifically provides that "[any] reasonably segregable portion [*653] of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law." Thus, any information on the applications and licenses that indicate times or places when the licensee is vulnerable to attack may be deleted. [10] The fact that parts of a requested document fall within

the terms of an exemption does not justify withholding the entire document. (*Northern Cal. Police Practices Project v. Craig (1979) 90 Cal.App.3d 116, 123-124 [153 Cal.Rptr. 173].*)

> 9 It is by no means clear, however, that public identification of "celebrity" license holders would subject them to increased risk of violent attack. Such disclosure cannot make the figure any more "public" and, in fact, may discourage an attack by a publicity seeking assailant who would forego notoriety for his own personal safety.
>
> In addition, the trial court impliedly found that, subject to the two exceptions, merely releasing the names of license holders posed no undue risk to them and that there was substantial evidence to support that finding. (See discussion, *infra*, at p. 654.)
>
> 10 A similar procedure was recently approved in *People v. Memro (1985) 38 Cal.3d 658 [214 Cal.Rptr. 832, 700 P.2d 446]*. That case involved an attempt by an accused to discover information contained in police officers' personnel files in connection with a claim that his confession had been coerced. The court held that *Evidence Code section 1045* permitted an in camera examination of the records to determine whether disclosure should be ordered "in the interests of justice" and whether disclosure would not "[unnecessarily] annoy[], embarrass[] or oppress[]" the individuals involved. (*Id., at pp. 688-689*; see also *Evid. Code, § 1045, subd. (d).*)

Defendants' contention that disclosure would discourage the filing of applications is also unpersuasive. This court respects the people's right to know and will not limit that right based on an inchoate fear that some will violate the law rather than have their names disclosed.

Next, defendants argue that the licensees' constitutional right of privacy would be violated by disclosing the concealed weapons information. To support this contention, they cite this court's decision in *ACLU, supra*, 32 Cal.3d 440.

ACLU concerned the disclosure of information on persons suspected of maintaining an association with organized crime. The information had been compiled by a network of law enforcement departments. This court held that documents listing individuals' names, physical traits, family members, residences, occupations, and associates in crime were protected from disclosure under the exemption for "intelligence information" (*§ 6254, subd. (f)*). [11] [**475] [***367] (*ACLU, supra, 32 Cal.3d 440, 449-450.*) The court stated that the exemption was required, "if not by the express terms of the Act, [then] by the right of privacy established in *article I, section 1 of the California Constitution.*" (*Id., at pp. 449-450.*)

> 11 The court did not order excision of the exempt information because it determined that segregation would "so reduce the utility of disclosing the documents to the ACLU, that the public interest [would] not be served by requiring disclosure" of the documents. (*ACLU, supra, 32 Cal.3d at p. 444.*)
>
> In the present case, defendants do not argue that segregation would be unduly burdensome.

Defendants also cite this court's decision in *White v. Davis (1975) 13 Cal.3d 757 [120 Cal.Rptr. 94, 533 P.2d 222]*. This case is inapposite. It concerned police officers, posing as students, who engaged in the covert recording of class discussions. These recordings were used by the police [*654] officers as "intelligence" reports about professors and students. This court held that the complaint stated a prima facie violation of the state constitutional right of privacy, observing that "a principal aim of the constitutional provision is to limit the infringement upon personal privacy arising from the government's increasing collection and retention of data relating to all facets of an individual's life. The alleged accumulation in 'police dossiers' of information gleaned from classroom discussions or organization meetings presents one clear example of activity which the constitutional amendment envisions as a threat to personal privacy and security." (*Id., at p. 761.*)

Neither of these cases supports defendants' claims for the wholesale suppression of records of the granting of licenses to carry a weapon. The concern in *ACLU* was for the harm that might result from the public revelation of the names or associates of individuals listed in an organized crime index. (*ACLU, supra, 32 Cal.3d at pp. 449-450.*) That information was in essence an allegation that the individual was a participant in criminal activity. None of these allegations had been substantiated in a court of law.

In contrast, the information sought here would not inflict the kind of immediate social stigma that arises from having one's name included on a list of suspected members of organized crime. Moreover, the information contained in the records here was voluntarily given to the sheriff by the applicants. It is sworn to be factually true. 12 Thus, the substantial privacy concerns implicated in *ACLU* are not present here.

12 Even more significant is the fact that the reason for issuance proffered in the majority of the current applications is the blanket statement: "For protection of life and property." The current licenses are primarily renewals. Contrary to the policy promulgated by the sheriff, these applications for renewal do *not* provide "convincing evidence of a clear and present danger to life or great bodily harm to the applicant."

While some of the holders of concealed weapon licenses may prefer anonymity, it is doubtful that such preferences outweigh the "fundamental and necessary" right of the public to examine the bases upon which such licenses are issued. It is a privilege to carry a concealed weapon.

Furthermore, there is a clear and legislatively articulated justification for disclosure -- the right of the public and the press to review the government's conduct of its business. Public inspection of the names of license holders and the reasons the licenses were requested enables the press and the public to ensure that public officials are acting properly in issuing licenses for legitimate reasons. Defendants' conclusion that *White* v. *Davis* precluded disclosure would obliterate the fundamental right of the press and the people to have access to "information concerning the conduct of the people's business." (*§ 6250.*)

[*655] It is possible, of course, that certain information supplied by individual applicants may under certain circumstances entail a substantial privacy interest. For example, the records may contain intimate information concerning an applicant's own or his family's medical or psychological history. In such special cases, the confidential information may be deleted.

The interest of society in ensuring accountability is particularly strong where [**476] [***368] the discretion invested in a government official is unfettered, and only a select few are granted the special privilege. Moreover, the degree of subjectivity involved in exercising the discretion cries out for public scrutiny. For example, the Sheriff of Orange County has issued over 400 licenses; in Los Angeles County only 35 licenses have been issued. Ostensibly, both sheriffs are applying the *same* statutory criteria for granting or denying these licenses. The apparent discrepancy indicates that something may be amiss. If the information on which the decision to grant can be kept from the public and the press, then there is *no* method by which the people can ever ascertain whether the law is being fairly and impartially applied.

Further, the historical treatment of concealed weapons licenses undermines the defendants' claim that the holders have an expectation of privacy regarding such records. *From 1957 to 1968, these licenses were open to public inspection pursuant to Penal Code section 12053.* [13] In the year following the enactment of the PRA, *Penal Code section 12053* was amended to delete this language. The change was made to ensure that these public records would be governed by the new Act. (See Stats. 1969, ch. 371, § 44, pp. 904-905 in conjunction with *62 Ops.Cal.Atty.Gen. 595, 600 (1979).*) It is important to note that the Legislature did *not* create an exemption, express or implied, for concealed weapons licenses. It did so for many other types of public records. (*§ 6254.*)

13 *Section 12053* stated in pertinent part: "When any such license is issued a record thereof shall be maintained in the office of the licensing authority *which shall be open to public inspection.*" (Italics added.)

(3) Finally, defendants point to *section 6254, subdivision (k)* as authority for nondisclosure of this information. [14] *Section 6254, subdivision (k)* exempts "[records] the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

14 In their supplemental briefs to this court, defendants argue for the first time that the exemption contained in *section 6254, subdivision (c)* for "[personal], medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" applies to the present case.

> The information relating to holders of concealed weapons permits is not in any way comparable to personnel or medical records. (See *62 Ops.Cal.Atty.Gen. 595, 600 (1979).*) Moreover, in light of the importance of the press and the public's right to know the workings of its government, disclosure here cannot be considered an unwarranted invasion of privacy.

[*656] As several courts considering the scope of this exemption have noted, subdivision (k) is not an independent exemption. It merely incorporates other prohibitions established by law. (*Cook v. Craig, supra, 55 Cal.App.3d 773, 783*; see *San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d 762, 775.*)

Here, the defendants assert that *Evidence Code section 1040* shields the sheriff from any duty to disclose. *Evidence Code section 1040* creates a privilege for official information acquired in confidence [15] if "[disclosure] of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . ." ([HN12] *Evid. Code, § 1040, subd. (b)(2).*) This privilege must be "applied conditionally on a clear showing that disclosure is against the public's interest." (*San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d 762, 777.*)

> 15 It is important to note that no statement of confidentiality is included in the statutory criteria for issuing the licenses or in the policy guidelines distributed by the police department.

The weighing process mandated by *Evidence Code section 1040* requires review of the same elements that must be considered under *section 6255* (*ACLU, supra, 32 Cal.3d 440, 446-447, fn. 6*). Therefore, it is consistent with the PRA. Under this privilege, the burden of demonstrating a need for nondisclosure is on the agency [**477] [***369] claiming the right to withhold the information. (*San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d 762, 780.*) Thus, this court's rejection of the claim of exemption under *section 6255* on the ground that the public interest weighs in favor of disclosure similarly requires rejection of the claims of exemption under *section 6254, subdivision (k)* and *Evidence Code section 1040.* (See *ACLU, supra, 32 Cal.3d 440, 446-447, fn. 6.*)

IV.

(4) Disclosure statutes such as the PRA and the federal Freedom of Information Act were passed to ensure public access to vital information about the government's conduct of its business. If the press and the public are precluded from learning the names of concealed weapons' licensees and the reasons claimed in support of the licenses, there will be no method by which the public can ascertain whether the law is being properly applied or carried out in an evenhanded manner.

The trial court granted injunctive relief permitting access to most of the licenses. This relief is inadequate in light of the purpose for which the [*657] information was sought. Without the applications which accompany the licenses and which set forth the reasons why a license is necessary, the public cannot judge whether the sheriff has properly exercised his discretion in issuing the licenses.

Therefore, this cause is remanded to the trial court for further proceedings consistent with this opinion. The costs on appeal are to be borne by the defendants.

DISSENT BY: MOSK

DISSENT

Mosk, J. I dissent.

Nearly three decades ago, the United States Supreme Court refused to allow the State of Alabama to obtain the names of members of the National Association for the Advancement of Colored People, because revelation would have exposed those persons to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." (*N.A.A.C.P. v. Alabama (1985) 357 U.S. 449, 462 [2 L.Ed.2d 1488, 1500, 78 S.Ct. 1163].*) Again in *Bates v. Little Rock (1960) 361 U.S. 516, 524 [4 L.Ed.2d 480, 486, 80 S.Ct. 412]*, the Supreme Court refused access to membership lists, even for taxing purposes, where the individuals could be subject to "harassment and threats of bodily harm."

The issue in the instant case, therefore, is whether the curiosity of the plaintiff in preparation of a television program, even one resulting in public knowledge, outweighs the constitutional privacy rights of 35 individuals who have expressed in applications their fear

of harassment and bodily harm. I reach the same conclusion as the unanimous Court of Appeal: that under these circumstances the individual privacy rights should prevail.

If the sheriff were issuing gun permits indiscriminately and thousands were extant, there might be a suspicion of misuse of his discretionary power and an implication that he himself was contributing to danger to public safety. The fact that in a county with the vast population of Los Angeles only 35 permits have been issued suggests the sheriff should be commended for his obvious determination to prevent a proliferation of dangerous weapons in the community.

[*658] I adopt as my dissent a substantial portion of the opinion of Justice Compton for the Court of Appeal, concurred in by Presiding Justice Roth and Justice Beach: *

> * Brackets together, in this manner [], without enclosing material, are used to indicate deletions from the opinion of the Court of Appeal; brackets enclosing material (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court.

[**478] [***370] The Columbia Broadcasting System, Inc. (CBS) by invoking provisions of the California Public Records Act (*Gov. Code, § 6255 et seq.*, hereafter the Act) seeks access to certain records of the Los Angeles County Sheriff's Department, specifically the records pertaining to persons to whom the sheriff has issued a license to carry a concealed weapon.

When the sheriff refused CBS's request, the latter instituted an action for injunctive and declaratory relief and sought a preliminary injunction. In this latter effort, CBS was partially successful in that the trial court directed the sheriff to disclose the names and certain identifying information concerning most of the individuals who had been granted licenses. The trial court denied CBS access to any data pertaining to two individuals and refused to require disclosure of the applications for permits which had been filed by the individuals. Both sides have appealed.

[I conclude] that the records in question are in their entirety exempt from disclosure under the Act. [I would] therefore direct that the preliminary injunction be vacated.

Carrying a firearm concealed on the person or in a vehicle is generally prohibited by *Penal Code section 12025*. Certain exceptions to the general prohibition are contained in *sections 12026* and *12027 of the Penal Code* but are not relevant here.

Penal Code section 12050 authorizes the sheriff of each county and the chief of any municipal police department to license, from year to year, certain qualified individuals to carry concealed firearms. The statutory criteria [are] that the person be a resident of the jurisdiction of the sheriff or chief, be of good sound character and show that good cause exists for such licensing.

The licensing procedure requires the preparation and collection of certain records including: (a) an application describing the applicant and the reason for desiring the permit (*Pen. Code, § 12051*); (b) a report of all data and information in the California Department of Justice files on the applicant, including any state summary criminal history information (frequently referred [*659] to as a "rap sheet") maintained pursuant to *Penal Code section 11105* (*Pen. Code, § 12052*); (c) any record of the investigation which is required to be made on each applicant (see *Salute v. Pitchess (1976) 61 Cal.App.3d 557, 561 [132 Cal.Rptr. 345]*); and (d) a record of the permit, if granted. (*Pen. Code, § 12053*.) The permit issued must set forth the data required in the application and a description of the weapon authorized to be carried. (*Pen. Code, § 12051*.)

The Los Angeles County Sheriff's Department has augmented the statutory provision by establishing an internal procedure and policy for processing applications for licenses. Procedurally the initial evaluation of all applications is made by a committee consisting of the undersheriff and the two assistant sheriffs -- the highest administrative echelons below the sheriff himself. The final decision is made by the sheriff, who under the statute, has broad discretion.

According to the sheriff's policy, good cause to issue a license exists when "The applicant produces convincing evidence of a clear and present danger to life or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which

danger would be significantly mitigated by the applicant's carrying of a concealed firearm; and (2) the applicant obtains a valid certificate from an advanced officer training institution approved by the California State Bureau of Collection and Investigative Services, attesting to [the] applicant's satisfactory completion of at least twenty-four hours of training. Alternate proof of firearms proficiency may be submitted for review and possible acceptance in lieu of this certificate."

Pursuant to the department's policy guidelines no concealed weapons license is granted "merely for the personal convenience of the applicant. No position or job classification in itself would constitute good cause for the issuance or denial of a [**479] [***371] license. Each application shall be individually reviewed for cause."

Sherman Block, the present defendant, has been Sheriff of Los Angeles County since January 1982. For a period of time prior to that date he served as undersheriff to his predecessor Peter J. Pitchess.

Prior to 1976, former Sheriff Pitchess had followed a policy of routinely denying applications for licenses except in a very limited number of cases. Those cases included judges and elected officials who expressed a concern for their personal safety. Twenty-four licenses were extant in 1976.

[*660] In that latter year, upon a petition for a writ of mandate by two attorneys, [the Court of Appeal] directed the sheriff to exercise his discretion by conducting an individualized investigation and making an individualized determination on each application. (*Salute v. Pitchess, supra, 61 Cal.App.3d 557.*)

The aforementioned internal policy and procedure was adopted in response to this court's mandate. Thirty-five licenses are now in existence. Sheriff Block, as undersheriff, thus served on the screening committee until his assumption of the office of sheriff. [I] point this out as evidence of Sheriff Block's familiarity with the process and his expertise in the field.

In April 1983, CBS requested by letter that Sheriff Block provide the news division of KCBS (a CBS-owned television station in Los Angeles) with copies of the permits then in effect which had been issued by the department.

Alternatively, CBS sought the names of each permit holder, their ages, addresses, occupations, and the reasons for the issuance of the permits as set forth in the various application forms. The information obtained was to form the basis of a television news report concerning the issuance of concealed weapons permits in Los Angeles County. According to a declaration submitted by the news director of KCBS in connection with the motion for a preliminary injunction, such information had become newsworthy as a result of a state Senate bill, introduced in March 1983, which purportedly would have liberalized the requirements for obtaining a concealed weapons license. CBS also professed to be concerned with the possible abuses of power by Sheriff Block in the issuance of the permits to either friends or substantial political contributors.

Sheriff Block denied the request on the ground "that there is a clear danger to the permittees that outweighs the public interest in disclosure." In asserting such grounds the sheriff was relying on *section 6255* of the Act, which permits a public official to withhold disclosure of a record where the public interest in nondisclosure outweighs the public interest in disclosure. 1

> 1 *Government Code section 6255* provides: "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

Before discussing [] the pivotal issue in the case [I] dispose of a number of collateral arguments advanced by both sides by declaring that beyond peradventure the records in question are subject to the Act and their disclosure [*661] or nondisclosure is governed by the provisions of the Act -- specifically *section 6255.*

Enacted in 1968 and modeled on the 1967 federal Freedom of Information Act (81 Stat. 54), the Act replaced a confusing mass of statutes and court decisions relating to disclosure of governmental records. (*American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440, 447 [186 Cal.Rptr. 235, 651 P.2d 822]*; see also Schaffer et al., *A Look at the California Records Act and Its Exemptions* (1974) 4 Golden Gate L.Rev. 203, 210-213.)

The legislative imprimatur of the Act is contained in *section 6250* declaring that ". . . the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

[**480] [***372] In the spirit of this declaration, judicial decisions interpreting the Act seek to balance the public right [of] access to information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy. (*American Civil Liberties Union Foundation v. Deukmejian, supra, 32 Cal.3d at p. 447*; see also *Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 651-652 [117 Cal.Rptr. 106]*; *American Federation of State etc. Employees v. Regents of University of California (1978) 80 Cal.App.3d 913, 915-916 [146 Cal.Rptr. 42]*; *Craig v. Municipal Court (1979) 100 Cal.App.3d 69 [161 Cal.Rptr. 19]*.)

The Act itself consists of a group of integrated sections which generally define public records and the rights of any person to inspect, copy, and receive copies of such records. (*Gov. Code, §§ 6252, 6253, 6253.5, 6254.7, 6254.8*.) These rights are, as noted, subject to certain exceptions only one of which is germane to this dispute.

Section 6255 has no counterpart in the federal Freedom of Information Act, and imposes on the courts of this state a duty which does not burden the federal courts -- the duty to weigh the benefits and costs of disclosure in each particular case. (*American Civil Liberties Union Foundation v. Deukmejian, supra, 32 Cal.3d at p. 452*; see also *Procunier v. Superior Court (1973) 35 Cal.App.3d 207, 209 [110 Cal.Rptr. 529]* [disapproved on other grounds in *Shepherd v. Superior Court (1976) 17 Cal.3d 107, 124 (130 Cal.Rptr. 257, 550 P.2d 161)*]; *Yarish v. Nelson (1972) 27 Cal.App.3d 893, 902-903 [104 Cal.Rptr. 205]*.)

[*662] The significance of *section 6255* lies in the fact that it provides a means by which an agency may withhold a public record which would not be exempt under any of the specific exemptions delineated in *section 6254*.

The statute specifically states that there are two public interests which must be considered when access to a public record is at issue, the interest served by disclosure and the interest served by nondisclosure. The section, however, does not purport to define these public interests. The public interest in disclosure is, for the most part, synonymous with the public's "right to know" and thus embodies all the concerns associated with the public's need to be informed of governmental activities. (See Barber, *The California Public Records Act: The Public's Right of Access to Governmental Information* (1976) 7 Pacific L.J. 105, 118.) The specific exemptions enacted in *section 6254* also make clear the Legislature's conception of the public interest in nondisclosure. An examination of *section 6254* reveals that the Legislature obviously intended to protect from disclosure those records which would expose personal or financial information relating to an individual (*Gov. Code, § 6254, subds. (c), (i), (n)*) or which compromise agency integrity by exposing state secrets (*Gov. Code, § 6254, subds. (b), (f), (h), (k)*), confidential sources of information (*Gov. Code, § 6254, subds. (f), (k)*), or agency deliberative processes (*Gov. Code, § 6254, subd. (a)*).

When the Legislature balanced the competing interests in formulating *section 6254*, it found that the public interest in nondisclosure of these types of records outweighed the public interest in disclosure. *Section 6255* was thus designed to act as a catchall for those individual records similar in nature to the categories of records exempted by *section 6254*, but which the Legislature determined, in balancing the competing interests, would not justify nondisclosure *as a general rule*. (See Barber, *The California Public Records Act: The Public's Right of Access to Governmental Information, supra*, at pp. 119-120.)

Section 6255 embodies the established common law rule that public policy demands certain records should not be open to indiscriminate public inspection, even if they are in the custody of a public official and even if they contain material of a public nature. (See *City & County of S.F. v. Superior Court (1951) 38 Cal.2d 156 [238 P.2d 581]*; *Craemer v. Superior Court (1968) 265 Cal.App.2d 216 [71 Cal.Rptr.* [**481] [***373] *193]*.) "[Where] there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed. In this regard the term 'public policy' means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or the public good." (*Craemer v. Superior Court, supra, at p. 222*.)

[*663] [It] is important at this juncture to emphasize that a license to carry a concealed weapon confers on the license holder nothing more than an immunity from prosecution for the misdemeanor of carrying a concealed weapon. The license does not give the holder the right to *use* the weapon in any manner not available to any other citizen.

[]

The sheriff, in his opposition to the motion for a preliminary injunction, set forth the following justification for his refusal to disclose the records.

"All of the concealed weapons licenses presently outstanding were issued by the Sheriff's Department to protect the applicant's life or that of his family from threats of violence made against them. In each case, there is a clear and present danger to the safety of these persons which cannot be protected by law enforcement resources. To make public the licenses issued or the information contained therein would subject the licensees to the increased risk of serious injury or death that the issuance of concealed weapons is designed to prevent.

"Many times a criminal's plans to commit a serious crime or serious injury to an intended victim fails for lack of proper planning and preparation. In this instance, if the identity of the licensee or the reason for issuance of a concealed weapons license became known to the criminal, the likelihood is that crime planning would become much more sophisticated and would involve an escalated use of force. This would substantially increase the likelihood of success of the crime at the risk of the safety to the licensee and his or her family. In short, if the criminal is aware that his victim is armed, he is likely to better plan his crime and use a more sophisticated weapon to ensure its success.

"In addition, some of the Department's licensees are prominent, well known people. It is quite likely that if their status as concealed weapons licensees became public, they would be subject to an increased risk of personal harm. Many persons who commit crimes of violence do so to get back at society and to obtain publicity for their criminal acts. If the identity of these officials and business people were made public, it is quite likely that these criminals would view an attack on these citizens as a larger challenge with all of the corresponding increased publicity.

"Lastly, to make public the identity of persons who possess concealed weapons would greatly inhibit the issuance of licenses to people who need them. For all of the reasons referred to above, if prospective applicants knew their identity was going to be made public, it is probable that they [*664] would not carry a concealed weapon. Because law enforcement cannot adequately protect these individuals and they would possess no weapon to protect themselves, specific and identifiable threats to them and their families would go unprotected, increasing the risk of physical harm."

[An] in camera examination of the records [] also convinced [the court below] that each of the 35 permits were issued by the sheriff's department to protect the applicant's life or that of his or her family from threats of violence made against them. In each instance there is a clear and present danger to the safety of these persons which cannot be protected by law enforcement resources. Public disclosure of the licenses issued or the information contained therein would undoubtedly subject the licensees to the increased risk of serious injury or death.

Public disclosure of the records would clearly jeopardize the safety of the permit [**482] [***374] holders, for it would provide a veritable shopping list of weapons potentially available for theft, and it would expose the particular vulnerabilities of the individuals who possess such weapons.

Balanced against the foregoing considerations is CBS's claim that the public "right to know" compels disclosure. []

According to CBS the matter of licenses to carry concealed weapons became a newsworthy subject when legislation was introduced to liberalize issuance of such licenses. CBS, the public, and more importantly the Legislature, already know the sheriff's procedure and policy and that only 35 licenses have been issued in the most populous county of the state.

CBS makes no claim that it has had any difficulty in identifying persons who have been denied permits. In fact, on July 7 and 8, 1983, CBS broadcast reports on that aspect of the issue.

CBS in addition, however, wants the names and addresses of the license holders together with the reasons for which the licenses were issued. The first and most obvious result of obtaining that information would be the

probability that the licensees would be subject to contact and questioning by media representatives -- not always a pleasant experience.

The second and more serious consequence would undoubtedly be the dissemination via television of the names, addresses, pictures and backgrounds of the licensees together with their assigned reasons for needing the licenses. [2]

> 2 CBS makes the assertion that it is a "responsible" organization and that we should not presume that indiscriminate disclosure would result. The problem with that argument is that if the information is subject to disclosure, there is no way that this court or the sheriff could limit it to CBS.

[*665] [I] have considerable difficulty in discerning any important public interest that would be served by exposing this group of citizens to such treatment, especially in view of the sheriff's expert assessment of the danger involved.

It may well be that in light of the serious crime problem which exists in our community and the Legislature's evident concern, [] the sheriff should be persuaded to liberalize his policy. That cause, however, will not be advanced one whit by disclosure of the identity of the 35 present licensees.

Moreover, public disclosure of such information might seriously discourage future applicants from being open and honest in providing the information required under *Penal Code section 12051.* If prospective applicants knew that their identity was to be made public, there also exists the strong possibility that they would not apply to carry a concealed weapon. This dramatically increases the probability that those who need to carry such weapons would do so irrespective of the laws which generally prohibit the possession of concealed firearms. Such a result is, of course, abhorent to our legal system and increases the risk of injury, accidental or otherwise, to the public as a whole.

CBS maintains that the concerns articulated by Sheriff Block constitute nothing more than unsupported speculation. [I] disagree. Sheriff Block, as an elected official with years of training and experience in the detection and prevention of crime, is particularly well suited to offer his opinion on the issues raised by this litigation. []

The evidence produced at the hearing on the preliminary injunction not only identified legitimate privacy interests in the release of concealed weapons information, but it also established that the need for CBS to obtain the data in question is minimal if not nonexistent. We are not dealing here, as did the court in *Salute v. Pitchess, supra, 61 Cal.App.3d 557,* with litigation involving persons who have been denied a concealed weapons permit. CBS's demands are overly broad and its assigned reasons are supported by no compelling interest that would serve the public welfare.

[]

The Legislature has vested designated law enforcement officials with almost unfettered discretion in this area. If that [**483] [***375] discretion is to be curtailed, the Legislature is the body to do it.

In light of the record presently before this court, [I] must assume that Sheriff Block, the duly elected sheriff, is performing his official duties with [*666] complete regularity, (see *Evid. Code, § 664*) and is presumed innocent of any wrongdoing. (*Evid. Code, § 520*; see also *Pen. Code, § 1096.*)

[]

"If citizenship in a functioning democracy requires general access to government files, limited but genuine interests also demand restricted areas of nonaccess. Decisional law on the subject accepts the assumption that a statute calling for general disclosure may validly define reasonably restricted areas of nondisclosure, provided that the latter are justified by genuine public policy concerns. One concern is the privacy of citizens whose information gets into government files. [para.] Overbroad claims to disclosure may threaten the privacy of individual citizens and accelerate the advent of the Orwellian state." (*Black Panther Party v. Kehoe, supra, 42 Cal.App.3d at p. 655.*)

Based upon the foregoing, [] the disclosure of the materials sought by CBS would constitute an unwarranted invasion of the privacy of the individual permit holders involved. (See *Cal. Const., art. I, § 1.*) Although [no one] [] can anticipate precisely the effects of public disclosure, [one] may surmise that general access to these records would result in an increased risk

of danger to all permittees. On the other side of the balance, [there is] [] no overriding public interest which mandates disclosure. It is, therefore, readily apparent that Sheriff Block was justified in denying CBS access to the documents in question.

The order granting a preliminary injunction [should be] reversed and the matter [] remanded to the trial court with directions to enter an order denying a motion for a preliminary injunction.

Ethics Complaint Number 03-150127

Complainant's Response to the Executive Director's Report and Recommendation

67.27 Justification of Withholding

FILED
15 APR 20 PM 4:42
SAN FRANCISCO
ETHICS COMMISSION
BY

Any withholding of information shall be justified, in writing, as follows:

(a) A withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this Ordinance, shall cite that authority.

(b) A withholding in the basis that disclosure is prohibited by law shall cite the specific authority in the Public Records Act or elsewhere.

(c) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority of case law., or any other public agency's litigation experience supporting that position.

(d) When a record being requested contains information , most of which is exempt from disclosure under the California Public Records Act and this Article, the custodian shall inform the requestor of the nature and extent of the nonexempt information and shall suggest alternative sources for the information requested, if avaible.

ADDITIONAL DOCUMENTS:
CASE 03-150127

FILED
15 APR 20 PM 1:41
SAN FRANCISCO
ETHICS COMMISSION
BY

Additional Documents

Case # 03-150127

April 20, 2015

Members of the Ethics Commission:

Howard Lazar of the San Francisco Arts Commission has a long standing history of altering documents; withholding public information and abusing his position as a public servant to willfully violate local law. See attached Orders of Determination; Notice of Warning and response to March 13, 2012 hearing.

The case before you is an example of a street inspection done on January 2, 2015 in which Howard Lazar walked alone. I videotaped as he spent 45 minutes in front of my stand. I stepped back and did not block him in any way. He went to the next stand near 835 Market Street to spend 30 seconds, looked over his shoulder and left. The email in question came from Wat So at the next stand. She was complaining that she believed I took a photo of her stand. Wat So showed me the email and Rebekah Krell verified that she sent an email. This email has nothing to do with an eye witness to an incident. That is the reason why Krell did not want to turn it over.

The attached letter I received from Howard Lazar shows no evidence of, "distupting the duties of a staff person" and the Notice of Warning should be rescinded. I went to the SFAC Offices at 5pm the day of the incident. I asked Krell if she wanted to see the tape. She said, "no". She said she would talk to Lazar and send me an email the following Monday. I had not heard from her and called on Tuesday. She again said there was an email from Wat So and began to read it.

I asked her to send it to me. She refused. She did not want to make an appointment to view the tape. I then made an IDR for the email. Krell was the Custodian of Records at the time.

Howard Lazar has a history of filing false log inspection reports. I stated that 17 times under public comment at full SFAC meetings. He has a long standing history of filing false police reports with claims that I, "stalked" him. He has also sworn out complaints with the SF City Attorney's Office on the same issue. In 2011, I spent 2 years in SF Criminal Court over a SFAC employees', "stalking" complaint. (Case #2235456). I did not know Evelyn Russell (Street Artist secretary) and always renewed by mail. Her claim was that, "I grunted 3 times on the phone". Russell did not appear at trial and I submitted emails stating that when I called 415-252-2583 (Lazar's phone) a female voice was singing gospel music. Lazar lied on the police report and Russell was fired. For 2 years, my First Amendment Rights were violated as I was prevented from attending all SFAC meetings.

While the facts of this specific case do not raise to the level of a WILLFUL violation under the Sunshine Ordinance, it shows the level of deception and trickery of Howard Lazar.
He has been employed there for over 44 years and has yearly performance reviews.
For more than 42 years, he was the Custodian of Records. Only last year, he was removed from that position. He never had Sunshine training and writes the minutes of the Street Artist Committee.

I would like a copy of the email in question and the Notice of Warning to be withdrawn for lack of evidence.

From: atreboux <atreboux@aol.com>
To: Krell, Rebekah (ART) (ART) <rebekah.krell@sfgov.org>
Subject: Fw: Immediate Disclosure Request
Date: Fri, Jan 16, 2015 4:05 pm

Subject: Immediate Disclosure Request

Request all emails regarding an inspection Howard Lazar made on Market between 4-5th Streets on Friday 2, 2015. You said you would send an email to me on January 5, 2015 after speaking with Lazar. You did not. when I was able to get you on the phone today, you cited an email that was sent by someone about this incident. it was forwarded to you by Howard Lazar. I request a copy of that email.

I am making this request pursuant to the Sunshine Ordinance.

Ann Treboux
atreboux@aol.com

Paula Datesh
150 Sutter Street #738
San Francisco, CA 94104
email:atreboux@aol.com
January 22, 2015

Ms. Krell;

I am responding to a letter sent to the above address dated January 5, 2015 from Howard Lazar. Exhibit #1:

The 1st paragraph mentions a report but does not reference it. Lazar mentions an Ordinance (Ord. 4-53)- but does not include it in his attachments. On page #2 of his attachments: he cites Section 5 but not reference which Ordinance. Lazar does mention where to find it.

Page #2 of his attachments does not define which violations are, "serious" and which are, "not serous". He does not reference the alleged violations in his letter as to which category they fall into.

He starts the letter in the 1st person; changes to the 3rd person; sends a copy to all Arts Commissioners Street Artist Committee and the Director of Cultural Affairs. Lazar does not cite which , "Arts" Commissioners" so I am not adequately informed. He does not include how to contact them.

RESPONSE TO INSPECTORS LOGBOOK DECEMBER 18, 2014

Lazar walked around alone that day. I was in M-3. The photos he referenced are from space M-9. I was packed up and on the phone when Lazar approached. I taped him from my phone as he approached. The photos included on page #3 and #4 do not speak to that day. Since Lazar does not reference which section of which Ordinance he is referencing, my response is that, "I displayed single feather earrings".-is that I do not know what that is. Each earring I make has multiple feathers and most are on leather. I do not use commercially manufactured pendants when making earrings. The process I use is all handmade by me. His claim of having no beads attached I false. Lazar second photo shows SF Giants earrings with 3 beads on each earring. Lazar did not ask me any questions and these photos do not speak to the inspection done on December 14, 2014. Again, his claim was that I was in M-3. These photos show space M-9. The inspection log book of December 14-includes false information with no evidence to support his claim.

RESPONSE TO INSPECTORS LOGBOOK OF JANUARY 2, 2015

I was not displaying commercially manufactured SF Giants pendants. These are flat bottle caps that I flattened; spray painted and drilled a hole into. Each one I made by hand. I did not display commercially manufactured silver-capped feather jewelry without any adornment. Again, I made all components of the earrings I sell. I have no problem making these items AGAIN before any member of your Committee. Lazar did not cite the, "pendant criteria" in his letter or attachments. He did not include where to find this information. His claim that I did not make them is false.

On January 2, 2015 Lazar came up on me from behind. He angry aimed a small silver camera at me. I *ALWAYS* tape him when he approaches me in the street. When I saw him, I stepped back a few feet and began to record. For 21 minutes I taped him without moving from behind my stand. His photo of me *BEHIND MY STAND* does not show, " I blocked him on the asides and in front of her display from taking photos". The photo Lazar submitted was me, *BEHIND MY STAND* recording him.

Lazar's claim that I was a few feet behind him as he was inspecting the Chor Yu Yeung stand is false. I continued taping him from my stand and the tape shows him passing the Yeung stand. He did not look at it and wished them a happy New Year. Note that stand is oversized and sells over 900 mass produced animal hats. Lazar ignores it on a regular basis.

A few minutes later, I packed up and went to see someone in City Hall. I showed the tape and Was advised to file a police report. I was able to get Ms. Krell on the phone. She asked for a copy of the tape to be emailed to her. I said it was too large. I stopped at the SFAC office at about 5pm the same day. Krell came out. She said she would question Lazar the following Monday and send me an email. Since I did not receive an email from her, I called on Tuesday. Krell's claim was that there was an eye-witness to the event on Jan. 2. She named the daughter of Chor Yu Yeung's email sent to Howard Lazar. I asked her to send it to me. She refused. I sent an Immediate Disclosure Request for the email. To date, there has been no response. I filed a complaint for the document with the SOFT task force.

Howard lazar has a habit of lying in his inspection log books. The permit revocation hearing of March 13, 2013 was held while I was in the hospital. Not only were my due process rights violated, I sent a letter asking for a continuance along with my response to the charges against

me. I was told in an email sent by Krell that, "all Commissioners would get my response and it would be posted on-line" It was not. Lazar log books detail a stalking event that did not take place. I was not working that day and he was not able to supply evidence to support his claim. At the Board of Permits and Appeals hearing-again Lazar did not supply a response to his charges; claimed to be too sick to attend and received a huge tongue lashing by Ms. Heung-the president. Cite www.sfgov.tv. Note also SF Sunshine Ordinance Order of Determination- Willful Order (William Clark v Howard Lazar). After one year of delays, Lazar admitted on the public Record to deleting sections of an audio tape. See attachment. Note also that Howard Lazar interrupted my public comment at the January 2015 Street Artist meeting. This is a violation of the 1st Amendment; The Brown Act and the Sunshine Ordiance. He said, "anyone can buy what you sell in Chinatown"'

Succinctly, these allegations have no merit or basis in fact. Lazar has once again wrote a badly Written letter; not cited the Ordinance or code he basis his allegations on or supplied adequate evidence to support his allegations. I have supplied adequate evidence to support my claim of Lazar falsifying an inspection (December 18 and Janaury 2, 2015). Not only do I deny all charges against me-I suggest that another studio visit be scheduled so that I may remake the same items I made 2 years ago. I further suggest a public hearing be held on these allegations. I want to be Given the opportunity to present evidence to the the allegations and to go on the public record with my defense.

The 21 minute tape of Lazar's January 2, 2015 inspection is avaible upon request. It will show that I did not block Lazar at all. It will show Lazar that Lazar lied in his inspector's log book.

sfac

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rts Commission

dwin M. Lee
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om DeCaigny
irector of
ultural Affairs

rograms:
ivic Art Collection
ivic Design Review
ommunity Arts & Education
ultural Equity Grants
ublic Art
FAC Galleries
treet Artist Licensing

S Van Ness Avenue, Ste. 345
an Francisco, CA 94102
el 415-252-2590
ax 415-252-2595
fartscommission.org
acebook.com/sfartscommission
witter.com/SFAC

ity and County of
an Francisco

January 5, 2015

NOTICE OF WARNING

Paula Datesh
150 Sutter Street, #738
San Francisco, CA 94104

Dear Ms. Datesh:

This is to inform you that a report was filed with the Arts Commission that you allegedly violated the Street Artist Ordinance (Ord. 41-83) on the following date and in the following manner:

December 18, 2014, Market Street, 5th to 4th streets:
1) Selling items not of the artist's own creation.

(Please see attached Inspector's Logbook).

January 2, 2015, Market Street, 5th to 4th streets:
1) Selling items not of the artist's own creation.
2) Obstructing the duty of a staffperson.

(Please see attached Inspector's Report and photos).

Please see the attached "NOTICE TO STREET ARTISTS" describing the Arts Commission's procedures with respect to such violations.

This is to respectfully request that you do not violate the Street Artist Ordinance.

If you wish to respond to this notice, please write to the Street Artists Program Director.

sfac

Notice to Street Artists

Section 5 of the Street Artists Ordinance allows the Director of Cultural Affairs to refuse to issue a street artists certificate or renewal if charges have been filed alleging deception or violation of the Street Artists Ordinance. The Art Commission has adopted the following procedures to implement Section 5. These procedures may be used to address violations in addition to, and may be taken with, the existing suspension-revocation procedures.

CHARGES OF MINOR VIOLATIONS OF THE STREET ARTISTS ORDINANCE:
--includes most violations of a non-violent/ non-threatening nature.

First Violation: "NOTICE OF WARNING" from Program Director.

Second Violation: "NOTICE OF INTENT TO RECOMMEND DENIAL OF CERTIFICATE OR RENEWAL" from Program Director.

Notice will offer artist an opportunity to have a public hearing with Program Director to discuss the charge. If artist agrees in writing to comply with Street Artists Ordinance, Program Director will recommend issuance of certificate or renewal. If artist does not agree in writing to comply with the ordinance, Program Director will recommend denial of certificate or renewal.

Third Violation: (when at least 1 of 3 of the incidents has been witnessed by Police or Program staff): "NOTICE OF WITHHOLDING OF CERTIFICATE OR RENEWAL PENDING HEARING" from Director of Cultural Affairs.*

CHARGES OF SERIOUS VIOLATIONS OF THE STREET ARTIST ORDINANCE
--includes violations of a violent or threatening nature and violations that significantly threaten integrity of Street Artists Program.

First Verifiable Violation: "NOTICE OF WITHHOLDING OF CERTIFICATE OR RENEWAL PENDING HEARING" from Director of Cultural Affairs.*

*Denials of certificates or renewals are governed by section 2408 of the Street Artists Ordinance. The Street Artists Program Committee will hold a public hearing on the certificate or renewal in accordance with Section 2408. A decision by the Committee and Program Director to deny certificate or renewal may be appealed to the Board of Appeals within 15 days, in accordance with section 2409 of the Street Artists Ordinance.

12/10/1998

San Francisco Arts Commission

Edwin M. Lee
Mayor

Tom DeCaigny
Director of
Cultural Affairs

Programs:
Civic Art Collection
Civic Design Review
Community Arts & Education
Cultural Equity Grants
Public Art
SFAC Galleries
Street Artist Licensing

25 Van Ness Avenue, Ste. 345
San Francisco, CA 94102
tel 415-252-2590
fax 415-252-2595
sfartscommission.org
facebook.com/sfartscommission
twitter.com/SFAC

City and County of
San Francisco

Sincerely,

Howard Lazar

Howard Lazar
Street Artists Program Director
Arts Commission

HL:al

Attachments:
Notice to Street Artists
Inspector's Logbook 12-18-14
Inspector's Logbook and photos 1-2-15

Cc: All Arts Commissioners, Street Artists Committee
Director of Cultural Affairs Tom DeCaigny

INSPECTOR' S LOGBOOK
THURSDAY, DECEMBER 18, 2014
1:35 – 3:50 p.m.
DOWNTOWN AND JUSTIN HERMAN PLAZA

1:35 p.m., Hallidie Plaza: Sunny, mild. Inspected the wares of the following artists:

Diswani Nono
Zhao Mei Pan
Masao Karube
Rui Ling Chang
Henoc de Alba – I showed him the photos of Dora's "butterfly" fork bracelets and asked him if he made ones that looked like them; he replied that he made the same design about 10 years ago.
Ismael Morales
Chao Ju Chang
Gat Wah Lee Chen
Shu Qi Dong
Jimmy Sha

1:45 p.m., Market Street, 5th to 4th streets:
M-9: David Campos
M-10: Wai Chi So

Manuel Loli was set up for business between "M-10" and "M-11", told me he had suffered from not being able to sell due to the rains, that this was the first dry day for him to sell, but that he would immediately dismantle his display and go elsewhere. I told him to try Hallidie Plaza. He began to dismantle his display.

M-11: James Toolate
M-12: Carlos Kuncar
M-4: Fernando Hechavarria (display)
M-3: **Paula Datesh** – displaying single feather earrings on ear wires (no beads or other adornment attached); also displaying orange-colored circular SF Giants pendant earrings on ear wires (no beads or other adornment attached); she videoed me while I inspected these commercially manufactured items.

Z-2: Zhenjie Feng
Z-1: Xing Zhi Yuan

Alyssa called me with names of artists whose certificates had recently expired.

2:05 p.m., Market Street at Grant Avenue:

INSPECTOR' S LOGBOOK
FRIDAY, JANUARY 2, 2015
2:05 – 3:35 p.m.
MARKET STREET CORRIDOR AND JUSTIN HERMAN PLAZA

2:05 p.m., Hallidie Plaza: Sunny; cold. Inspected the wares of the following artists:

Zhao Mei Pan
Masao Karube
Alejandro Galicia-Chavez
Ismael Morales
Rui Ling Chang
Yu Qi Chen
Shu Qi Dong – crocheting a red hat
Jimmy Sha

Still lots of holiday shoppers in the Downtown area.

2:20 p.m., Market Street, 5th to 4th streets:
M-9: **Paula Datesh** – again displaying the commercially manufactured SF Giants pendant earrings and commercially manufactured silver-capped feather jewelry on earwires without any adornment. The Giants pendant earrings had 3 beads attached which, if they didn't come attached with the commercial pendants, would still violate the Arts Commission's pendant criteria because the pendants which Paula did not make were not subordinate to, or an integral part of, the design.

I took photos of her display of the items, and while I was doing so, she aimed her mobile device at me and then blocked me (at the sides and front of her display) from taking my photos.

M-10: Chor Yu Yeung / Wai Chi So – while I was inspecting their display, Paula was a few feet behind me aiming her mobile device at me.
M-11: Al Gamarra
M-12: Carlos Kuncar
M-3: Henoc de Alba - display

Z-2: Xue You Mai – crocheting
Z-1: Zhong Yu Wang

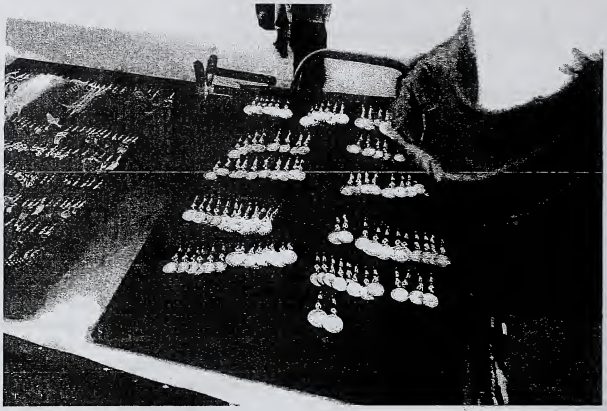
2:35 p.m., Market Street at 4th Street:
no artists

2:37 p.m., Market Street at Grant Avenue:
no artists

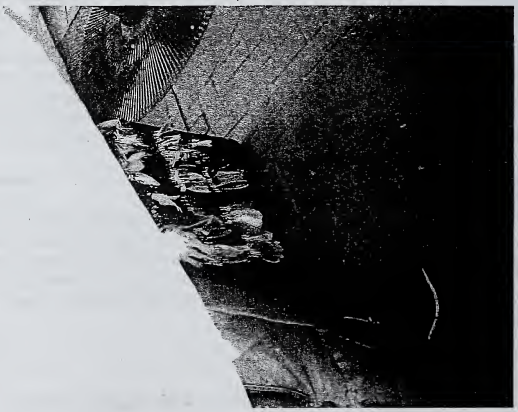
2:44 p.m., Market Street at Sutter Street:
no artists.

2:55 p.m., Market Street, Spear to Steuart streets:

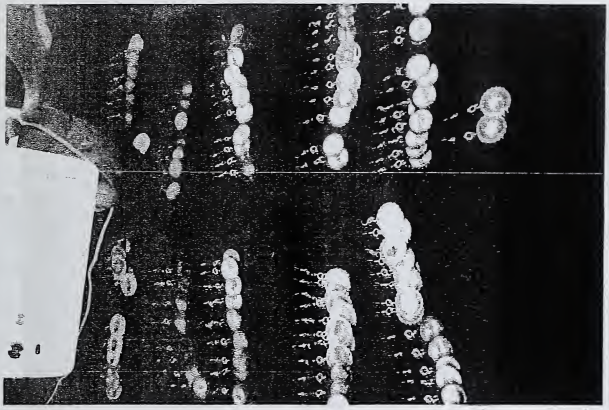
January 2, 2015 –
Lazar



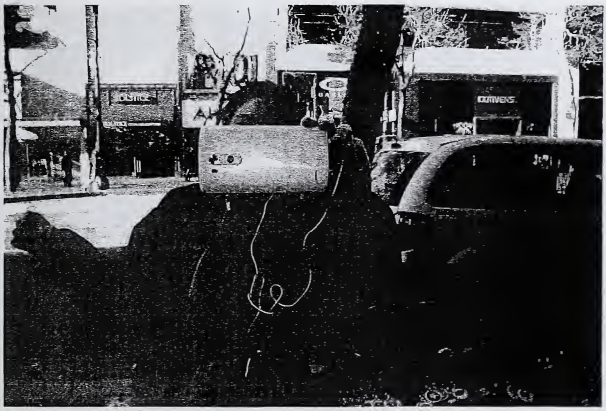
Paula Datesh #8890



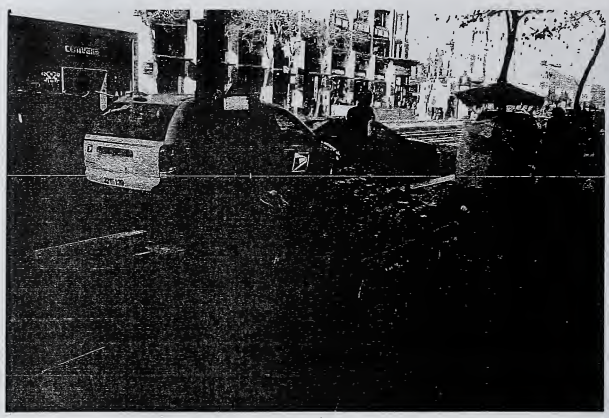
January 2, 2015 - Lazar



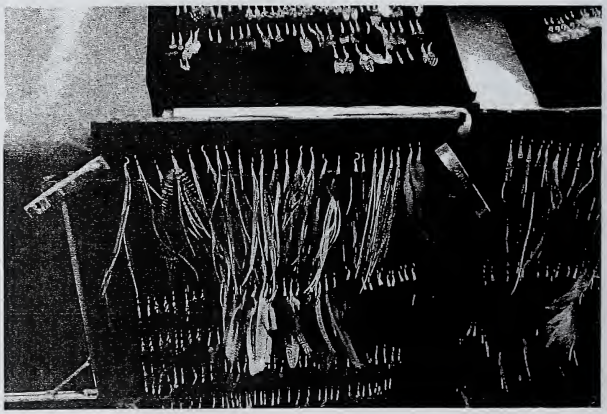
Pavla Datesh #8828



January 2, 2015. Lazar



Paula Datsch #8898



25 Van Ness Avenue, Suite 345
San Francisco, CA 94102
T: 415-252-4665 F: 415-252-2595
sfartscommission.org

e-Newsletter | Twitter | Facebook | YouTube | Flickr

From: <pdatesh@aol.com>
Date: Tue, 12 Mar 2013 15:17:07 -0700
To: Rebekah <rebekah.krell@sfgov.org>
Subject: Re: FedEx Received and Posted

I refer the emailed copy Which was sent to you and Kate this afternoon
via Speedway in Sf. The photos are
clearer. Please use that copy.
Thanks

Paula

On Mar 12, 2013, at 3:03 PM, "Krell, Rebekah" <rebekah.krell@sfgov.org> wrote:

> Hello Paula,
>
> Per your request, I'm writing to confirm receipt of the FedEx documents you sent. All will be posted online and copies will be made for the Commissioner's for tomorrow's hearing. We will redact your email address. Please let me know if you have any questions.
>
> Best,
>
> Rebekah
>
> Rebekah Krell
> **Deputy Director & CFO**
>
> **San Francisco Arts Commission**
> **25 Van Ness Avenue, Suite 345**
> **San Francisco, CA 94102**
> **T: 415-252-4665 F: 415-252-2595**
> **sfartscommission.org**
>
> e-Newsletter | Twitter | Facebook | YouTube | Flickr

From: Paula Datesh <pdatesh@aol.com>
To: Pdatesh <Pdatesh@aol.com>
Subject: Fwd: FedEx Received and Posted
Date: Sat, Aug 3, 2013 6:30 pm

Ok, will do.

Rebekah Krell
Ok, will do.

Rebekah Krell
Deputy Director & CFO
Ok, will do.

Rebekah Krell
Deputy Director & CFO

San Francisco Arts Commission
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> **Hello Paula,**
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> **Per your request, I'm writing to confirm receipt of the FedEx documents you sent. All will be posted online and copies will be made for the Commissioner's for tomorrow's hearing. We will redact your email address. Please let me know if you have any questions.**
>
> **Best,**
>
> **Rebekah**
>
> Rebekah Krell

SUNSHINE ORDINANCE
TASK FORCE

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. (415) 554-7724
Fax No. 415) 554-7854
TDD/TTY No. (415) 554-5227

July 6, 2011

San Francisco Ethics Commission
Benedict Y. Hur, Chairperson
Jamienne S. Studley, Vice-Chairperson
Beverly Hayon
Dorothy S. Liu
Charles L. Ward
25 Van Ness Avenue, Suite 220
San Francisco, California 94102

Re: William and Robert Clark vs. Arts Commission (Sunshine Ordinance Task Force Case No. 11037): Request for Ethics Commission enforcement action for willful violations of Sunshine Ordinance by Howard Lazar, Street Artists Program Director for the City Arts Commission

Dear Commissioners:

At its regular meeting of June 28, 2011, the Sunshine Ordinance Task Force voted unanimously to find that Howard Lazar, Street Artists Program Director for the City Arts Commission, had willfully violated two provisions of the Sunshine Ordinance in handling a public-records request from William and Robert Clark, designated as Task Force Case No. 11037:

– Sunshine Ordinance Section 67.21(c), which states: "A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure, and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request..."

– Sunshine Ordinance Section 67.28(a), which states: "No fee shall be charged for making public records available for review."

In testimony before the Task Force at the aforesaid meeting, Messrs. Clark said they had requested certain information from Mr. Lazar; that upon being informed that the

information was available, they visited the Arts Commission office, were shown a pair of Manila envelopes, and were told that they would have to pay four dollars and ninety cents ($4.90) to view the forty-nine pages contained in one envelope, and two dollars and ten cents ($2.10) to view the twenty-one pages contained in the other envelope; and that of the seventy pages they paid to view, only four contained information they had requested.

The Clarks' testimony and printed material included in the information packet for the aforesaid meeting convinced the Task Force that:

– Rather than providing only the information that the Clarks requested, Mr. Lazar resorted to a practice known as "sand-bagging" – mixing the requested information in with a huge volume of superfluous information, forcing them to spend valuable time to comb through the material for the information they had sought. Mr. Lazar thereby skirted the Section 67.21(c) requirement to "assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian."

– The Clarks should not have been charged to look at any material, because they had not asked for reproduction thereof; their request would have been satisfied if they had merely been permitted on-site scrutiny of the information they requested. Mr. Lazar thereby violated, or caused to be violated, the afore-cited Section 67.28(a) of the Sunshine Ordinance.

The Street Artists Program is funded in whole or in part through fees charged to the artists, under both voter initiative and legislative City ordinance. Not only members of the public have a right to public information access but, even more, those who pay fees for no direct services in return. This is a major guiding principle of the Public Records Act, which is the basis of the Sunshine Ordinance that the Task Force is charged to uphold, much as the Ethics Commission is charged to uphold the Fair Political Practices Act and the FPPA-based local rules on accountability and transparency in the political process.

Besides all of the above, Mr. Lazar willfully violated Sunshine Ordinance Section 67.21(e) by failing to attend the Task Force's hearing into the Clarks' complaint. Mr. Lazar and an associate, Julio Mattos, attended the June 28, 2011, meeting of the Task Force but abruptly left the meeting room while the Clarks were presenting their complaint; neither Mr. Lazar nor Mr. Mattos returned. When the Task Force Chair asked if anyone in the audience wished to present facts and evidence in support of the respondent – i.e. Mr. Lazar – no one responded. Section 67.21(e) states in part: "Where requested by [a] petition, the Sunshine Task Force may conduct a public hearing concerning [a] records request denial. An authorized representative of the custodian of the public records requested shall attend ***any*** hearing and explain the basis for its decision to withhold the records requested." (Emphasis added.)

The latter-most violation continues a pattern of willful misconduct by Arts Commission staff personnel in responding to sunshine-related complaints. They failed to send a knowledgeable representative to hearings that the Task Force held on February 22, 2011, and May 18, 2011. Following the May 18 meeting, the Task Force received a letter stating that the Arts Commission was not notified of the hearing held on that date. However, after reviewing communications records, Task Force Administrator Chris Rustom assured all concerned – including providing corroborating documentation – that he had, in accordance with proper procedure, notified the parties-in-interest well in advance of the hearing date.

The Task Force recognizes that extenuating and mitigating circumstances might on occasion arise; however, that the absence of knowledgeable representation on the Commission staff's part is repetitive shows a pattern of callous disregard for the public's right to know and for the Task Force's exercise of due process, and further evidences the willful nature of the violation.

Accordingly, the Task Force files this petition with the Ethics Commission under Sunshine Ordinance Section 67.34, which states: "The willful failure of any ... managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission."

We strongly urge that the Ethics Commission exercise any and all powers that you have to (1) effect redress of the financial penalty illegally imposed on the Clarks for exercising their rights under the Sunshine Ordinance and the Public Records Act; and (2) impose a fine and/or penalty on Mr. Lazar for his willful violations of the Sunshine Ordinance.

This episode, unfortunate though it is, provides an opportunity for the Ethics Commission to send a loud, clear message that willful violation of City and State sunshine laws will not be tolerated. Thank you for your attention.

Sincerely,

Richard A. Knee

Richard A. Knee
Sunshine Ordinance Task Force Chair

C: Mayor Edwin Lee
Board of Supervisors
Arts Commission

William and Robert Clark, Complainants in Sunshine Ordinance Task Force Case No. 11037

Howard Lazar, Respondent in Sunshine Ordinance Task Force Case No. 11037

SUNSHINE ORDINANCE
TASK FORCE

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. (415) 554-7724
Fax No. 415) 554-7854
TDD/TTY No. (415) 554-5227

July 6, 2011

Honorable Edwin Lee, Mayor
Honorable Members of the Board of Supervisors
City and County of San Francisco
David Chiu (District 3), President
Eric Mar (District1)
Mark Farrell (District 2)
Carmen Chu (District 4)
Ross Mirkarimi (District 5)
Jane Kim (District 6)
Sean Elsbernd (District 7)
Scott Wiener (District 8)
David Campos (District 9)
Malia Cohen (District 10)
John Avalos (District 11)

Dear Ladies and Gentlemen:

Please find enclosed with this note a copy of a letter from the Sunshine Ordinance Task Force to the Ethics Commission wherein the Commission is requested to take any and all steps within its power to discipline Howard Lazar, Street Artists Program Director for the Arts Commission, for multiple willful violations of the City's Sunshine Ordinance.

Please recall that the Task Force, in a letter dated June 17, 2011, called your attention to numerous instances in which Arts Commission staff personnel (1) had withheld disclosable public information, oral and/or documentary, in violation of the Ordinance and the California Public Records Act, and (2) had repeatedly failed to send a knowledgeable representative to Task Force hearings into citizens' allegations of said, such failures also constituting a violation of the Ordinance.

The Task Force felt this was necessary and proper especially at this time, as deliberations on the City's 2011-12 are in progress; every City entity must be held accountable for the amount of money it is requesting, its intended use of that money, and its expenditures during the current and previous fiscal years.

By copying to you our letter to the Ethics Commission, the Task Force wishes to renew your attention to the apparently standard practice by certain Arts Commission staff personnel to dodge that accountability, and we again urge that you raise concerns with the Arts Commission on this matter. Thank you for your attention.

Sincerely,

Richard A. Knee
Sunshine Ordinance Task Force Chair

Enclosure: Letter from Sunshine Ordinance Task Force to Ethics Commission

Cc: Arts Commission

SUNSHINE ORDINANCE
TASK FORCE

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. (415) 554-7724
Fax No. 415) 554-7854
TDD/TTY No. (415) 554-5227

May 18, 2012

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Referral of Willful Violation of the Sunshine Ordinance
Sunshine Complaint No. 11045, William Clark v. Arts Commission

The Sunshine Ordinance Task Force ("Task Force") hereby refers willful violation findings against Howard Lazar, Street Artists Program Director for the San Francisco Arts Commission, in Sunshine Complaint No. 11045, *William Clark v. Arts Commission.*

This willful violation finding is referred for appropriate action pursuant to:

(1) Sunshine Ordinance Section 67.34 whereby "complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission;" and

(2) Sunshine Ordinance Section 67.30(c) which provides that "the Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this ordinance."

Background

William Clark filed a complaint with the Task Force on June 14, 2011 alleging that Howard Lazar violated public records laws by failing to respond to his May 27, 2011 request for information regarding a proposal for street artists space by the Hayes Valley Merchant Association.

Task Force Hearing on Complaint

On August 23, 2011, the Task Force held a hearing on the complaint. William Clark presented his complaint and Julio Mattos, contract clerk for the Arts Commission, appeared on behalf of

Howard Lazar and presented the response. Mr. Lazar was not present at the hearing and had not provided a response to Mr. Clark prior to the date of hearing.

The Task Force found Mr. Lazar in violation of Sunshine Ordinance Sections:

(1) 67.21(b) for failure to release the public information to Mr. Clark within 10 days of receiving the public records request;

(2) 67.22(b) for failure to release public information to Mr. Clark on a timely and responsive basis; and

(3) 67.21(e) for failure to send a knowledgeable representative to the Task Force hearing.

The Task Force further found Mr. Lazar had willfully violated these sections of the Sunshine Ordinance under Section 67.34 based on his pattern and practice of inadequate responses, repeated violations of the Sunshine Ordinance, and evident lack of intent to comply with the Sunshine Ordinance in the future.

An audio recording of the Task Force hearing on the complaint and supporting documentation is available on the Task Force's web site. Please contact the Task Force Administrator by email at sotf@sfgov.org or telephone at (415) 554-7724 to request this information be forwarded in hard copy format.

Thank you for your attention to this matter. Please confirm receipt of this notice to the Task Force Administrator.

Hope Johnson

Hope Johnson, Chair
Sunshine Ordinance Task Force

Encl.

cc: William Clark, Complainant
Howard Lazar, Street Artist Program Director, Arts Commission, Respondent
Jerry Threet, Deputy City Attorney

CITY AND COUNTY OF SAN FRANCISCO

SUNSHINE ORDINANCE TASK FORCE

ORDER OF DETERMINATION
August 19, 2013

DATE THE DECISION ISSUED
July 9, 2013

PAULA DATESH VS. ARTS COMMISSION, HOWARD LAZAR (13005)

FACTS OF THE CASE

Paula Datesh ("Complainant") alleges Howard Lazar, Program Director and the San Francisco Arts Commission (the "Commission") violated the Ordinance by failing to provide the Complainant with requested public information in a number of separate categories.

COMPLAINT FILED

On February 8, 2013, Ms. Datesh filed a complaint with the Task Force alleging violations of Sections 67.21, 67.24, 67.26, and 67.27 of the Ordinance.

HEARING ON THE COMPLAINT

On July 9, 2013, Complainant Ms. Datesh appeared before the Task Force and presented her claim. Respondent, Howard Lazar, Program Director presented the Arts Commission's defense.

The issue in the case is whether the Arts Commission violated Sections 67.21, 67.24, 67.26, and 67.27 of the Ordinance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force finds the testimony of Complainant Ms. Datesh to be persuasive and finds Sections 67.25(a) and 67.21(e) to be applicable in this case. The Task Force does not find that testimony provided by Howard, Program Director, Arts Commission persuasive to resolving the allegations of violation of these two provisions of the Ordinance in this case.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the Arts Commission violated Sections 67.25(a) for failure to respond the day following the Immediate Disclosure Request and 67.21(e) for failure to comply with the records request in a timely manner. The Arts Commission shall release the records requested within 5 business days of the issuance of this Order and appear before the Education, Outreach and Training Committee on September 9, 2013 for a hearing on the adequacy of the Commission's policies and processes for responding to public records requests.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on July 9, 2013 by the following vote: (Pilpel/Knee)
Ayes: Knee, Washburn, Pilpel, Sims, David Hyland, Oka, Fischer, Grant

Kitt Grant, Chair
Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney
Paula Datesh, Complaint
Howard Lazar, Respondent
Kate Patterson, Respondent

ORDER OF DETERMINATION
February 7, 2014

DATE THE DECISION ISSUED
January 30, 2014

CASE TITLE – PAULA DATESH V. HOWARD LAZAR AND SHARRON PAGE RITCHIE, SAN FRANCISCO ARTS COMMISSION (File No. 13036)

FACTS OF THE CASE

Paula Datesh (Complainant) made a complaint alleging that the San Francisco Arts Commission (Respondent) violated provision of the Sunshine Ordinance by: 1) improperly posting Complaints letter in the agenda for the March 13, 2013, meeting of the Street Arts Licensing Committee; and 2) failing to post minutes for meetings in a timely fashion.

COMPLAINT FILED

On July 18, 2013, Complainant filed a complaint with the Task Force regarding the Respondent's alleged failure to properly post Complainant's letter to a meeting agenda and failure to post meeting minutes in a timely fashion.

HEARING ON THE COMPLAINT

On January 30, 2014, Complainant, appeared before the Task Force and presented her claim. Kate Patterson, Arts Commission (Respondent), presented the Arts Commission's defense.

The issue in the case was whether the Agency violated Sections 67.9 and/or 67.16 of the Sunshine Ordinance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force finds the testimony of the Complainant to be persuasive and finds Sunshine Ordinance Section 67.16 to be applicable in this case. The Respondent acknowledged their error and agreed with the findings of the Sunshine Ordinance Task Force.

DECISION AND ORDER OF DETERMINATION

The Task Force finds the San Francisco Arts Commission in violation of Section 67.16 of the Sunshine Ordinance for failure to post the San Francisco Arts Commission's meeting minutes of April 1, 2013, May 6, 2013, May 20, 2013, and June 3, 2013, in a timely manner.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on January 30, 2014, by the following vote: (Washburn/Hyland)

Ayes: Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer
Absent: David, Grant

Kitt Grant, Chair
Sunshine Ordinance Task Force

c: Nicholas Colla, Deputy City Attorney
Jerry Threet, Deputy City Attorney
Paula Datesh, Complainant
Howard Lazar, SF Arts Commission
Sharon Page-Ritchie, SF Arts Commission
Kate Patterson, SF Arts Commission

ORDER OF DETERMINATION
February 7, 2014

DATE THE DECISION ISSUED
February 5, 2014

CASE TITLE – PAULA DATESH V. HOWARD LAZAR AND REBEKAH KRELL, SAN FRANCISCO ARTS COMMISSION (File No. 13052)

FACTS OF THE CASE

Paula Datesh (Complainant) made a complaint alleging that the San Francisco Arts Commission (Respondent) violated provision of the Sunshine Ordinance by failing to timely respond to her immediate disclosure request on the following two occasions: 1) Howard Lazar, Arts Commission, failed to respond to Complainant's August 28, 2013, request for information; and 2) Rebekah Kress, Arts Commission failed to respond to Complaint's request for information on an unknown date.

COMPLAINT FILED

On September 4, 2013, Complainant filed a complaint with the Task Force regarding the Respondent's alleged failure to timely respond to complaint's immediate disclosure request.

HEARING ON THE COMPLAINT

On February 5, 2014, Complainant appeared before the Task Force and presented her claim. Howard Lazar, Arts Commission (Respondent), presented the Arts Commission's defense.

The issue in the case was whether the Agency violated Sections 67.21 and 67.25 of the Sunshine Ordinance and/or Section 6253 of the California Government Code.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the, Task Force finds the testimony of the Complainant to be persuasive and finds Sunshine Ordinance Sections 67.25(a) and 67.21(b) to be applicable in this case. The Respondent acknowledged their error and agreed with the findings of the Sunshine Ordinance Task Force.

DECISION AND ORDER OF DETERMINATION

The Task Force finds the San Francisco Arts Commission in violation of Section 67.25(a) and 67.21(b) for failure to respond to an immediate disclosure request in a timely manner.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on February 5, 2014, by the following vote: (Fischer/Knee)

Ayes: Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Absent: David

Kitt Grant, Chair
Sunshine Ordinance Task Force

c: Nicholas Colla, Deputy City Attorney
Jerry Threet, Deputy City Attorney
Paula Datesh, Complainant
Howard Lazar, SF Arts Commission
Rebekah Krell, SF Arts Commission
Kate Patterson, SF Arts Commission

CITY AND COUNTY OF SAN FRANCISCO

SUNSHINE ORDINANCE TASK FORCE

ORDER OF DETERMINATION
May 8, 2014

DATE THE DECISION ISSUED
April 30, 2014

CASE TITLE – PAULA DATESH V. HOWARD LAZAR, SAN FRANCISCO ARTS COMMISSION (File No. 14018)

FACTS OF THE CASE

Paula Datesh (Complainant) made a complaint alleging that Howard Lazar, San Francisco Arts Commission (Respondent) violated provisions of the Sunshine Ordinance by failing to respond to immediate disclosure requests in a timely manner.

COMPLAINT FILED

On February 13, 2014 Ms. Datesh filed complaints against the San Francisco Arts Commission alleging failure to respond to various immediate disclosure requests in a timely manner.

HEARING ON THE COMPLAINT

On April 30, 2014, Ms. Datesh appeared before the Task Force and presented her claim. Howard Lazar, Arts Commission and Kate Paterson-Murphy (Respondent), presented the Arts Commission's defense.

The issue in the case was whether the Arts Commission violated Sections 67.21 and 67.25 of the Sunshine Ordinance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented, the Task Force finds the testimony of Ms. Datesh to be persuasive and finds Sunshine Ordinance Sections 67.25(a) to be applicable to this case. The Task Forces does not find the testimony provided by Mr. Lazar, Arts Commission, persuasive to this case.

DECISION AND ORDER OF DETERMINATION

The Task Force finds the San Francisco Arts Commission in violation of Section 67.25(a) for failure to respond to an immediate disclosure request in a timely manner. The San Francisco Arts Commission shall appear before the Compliance and Amendments Committee to discuss methods to insure that immediate disclosure requests are responded to in a timely manner.

DECISION AND ORDER OF DETERMINATION

The Task Force finds the San Francisco Arts Commission in violation of Section 67.25(a) and 67.21(b) for failure to respond to an immediate disclosure request in a timely manner.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on February 5, 2014, by the following vote: (Fischer/Knee)

Ayes: Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Absent: David

Kitt Grant, Chair
Sunshine Ordinance Task Force

c: Nicholas Colla, Deputy City Attorney
Jerry Threet, Deputy City Attorney
Paula Datesh, Complainant
Howard Lazar, SF Arts Commission
Rebekah Krell, SF Arts Commission
Kate Patterson, SF Arts Commission

ORDER OF DETERMINATION
May 8, 2014

DATE THE DECISION ISSUED
April 30, 2014

CASE TITLE – PAULA DATESH V. HOWARD LAZAR, SAN FRANCISCO ARTS COMMISSION (File No. 14018)

FACTS OF THE CASE

Paula Datesh (Complainant) made a complaint alleging that Howard Lazar, San Francisco Arts Commission (Respondent) violated provisions of the Sunshine Ordinance by failing to respond to immediate disclosure requests in a timely manner.

COMPLAINT FILED

On February 13, 2014 Ms. Datesh filed complaints against the San Francisco Arts Commission alleging failure to respond to various immediate disclosure requests in a timely manner.

HEARING ON THE COMPLAINT

On April 30, 2014, Ms. Datesh appeared before the Task Force and presented her claim. Howard Lazar, Arts Commission and Kate Paterson-Murphy (Respondent), presented the Arts Commission's defense.

The issue in the case was whether the Arts Commission violated Sections 67.21 and 67.25 of the Sunshine Ordinance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented, the Task Force finds the testimony of Ms. Datesh to be persuasive and finds Sunshine Ordinance Sections 67.25(a) to be applicable to this case. The Task Forces does not find the testimony provided by Mr. Lazar, Arts Commission, persuasive to this case.

DECISION AND ORDER OF DETERMINATION

The Task Force finds the San Francisco Arts Commission in violation of Section 67.25(a) for failure to respond to an immediate disclosure request in a timely manner. The San Francisco Arts Commission shall appear before the Compliance and Amendments Committee to discuss methods to insure that immediate disclosure requests are responded to in a timely manner.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on April 30, 2014, by the following vote: (Hyland/Knee)

Ayes: Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Noes: None
Absent: Washburn, David

Louise Fischer, Vice-Chair
Sunshine Ordinance Task Force

c: Nicholas Colla, Deputy City Attorney
Jerry Threet, Deputy City Attorney
Paula Datesh, Complainant
Howard Lazar, SF Arts Commission
Kate Patterson, SF Arts Commission

ORDER OF DETERMINATION
August 5, 2014

DATE THE DECISION ISSUED
July 22, 2014

CASE TITLE – PAULA DATESH V. SHARON PAGE RITCHIE, SAN FRANCISCO ARTS COMMISSION (File No. 14034)

FACTS OF THE CASE

Paula Datesh (Complainant) made a complaint alleging that Sharon Page Ritchie and Howard Lazar, San Francisco Arts Commission (Respondent), violated provisions of the Sunshine Ordinance by failing to post either meeting minutes, audio recordings, or both, for various meetings in a timely manner.

COMPLAINT FILED

On various dates, Ms. Datesh filed complaints against the San Francisco Arts Commission alleging failure to post multiple meeting minutes, audio recordings, or both, for various meetings in a timely manner.

HEARING ON THE COMPLAINT

On July 22, 2014, Ms. Datesh appeared before the Task Force and presented her claim. Sharon Page-Ritchie and Howard Lazar, San Francisco Arts Commission (Respondent), presented the San Francisco Arts Commission's defense.

The issue in the case was whether the San Francisco Arts Commission violated Sections 67.14(b) and 67.16 of the Sunshine Ordinance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented, the Task Force finds the testimony of Ms. Datesh to be persuasive and finds Sunshine Ordinance Sections 67.14 and 67.16 to be applicable to this case for failure to audio record various meetings and failure to post meeting minutes for various meetings in a timely manner.

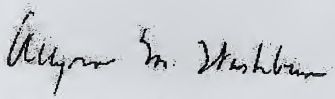
DECISION AND ORDER OF DETERMINATION

The Task Force finds Sharon Page-Ritchie, San Francisco Arts Commission, in violation of Sunshine Ordinance Sections 67.14 and 67.16 for failure to audio record various meetings and failure to post meeting minutes for various meetings in a timely manner.

The San Francisco Arts Commission is ordered to appear before the Compliance and Amendments Committee, on a date to be determined, to provide a report that includes a full and comprehensive accounting/review of all minutes, audio recordings, and website postings for the Arts Commission. The report should include, at a minimum: 1) status on all recordings and minutes required to be available and posted online; 2) estimated timeframe to address outstanding issues related to meeting minutes and audio recordings; 3) inventory of all audio recordings available in various formats; and 4) plan with timeframe to resolve any outstanding issues.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on July 22, 2014, by the following vote: (Hepner/Oka)

Ayes: 9– Rumold, Winston, Pilpel, Hepner, David, Fischer, Oka, Hyland, Washburn
Noes: 0 – None
Absent: 1 – Wolf



Allyson Washburn, Chair
Sunshine Ordinance Task Force

c: Nicholas Colla, Deputy City Attorney
Paula Datesh, Complainant
Sharon Page Ritchie, San Francisco Arts Commission
Kate Patterson, San Francisco Arts Commission

SUNSHINE ORDINANCE
TASK FORCE

City Hall
1 Dr Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689
Tel. No. (415) 554-7724
Fax No. (415) 554-7854
TTD/TTY No. (415) 554-5227

ORDER OF DETERMINATION
March 21, 2015

DATE RECOMMENDATION ISSUED
February 4, 2015

CASE TITLE - Paula Datesh v. San Francisco Arts Commission (SFAC)(File No. 14089)

FACTS OF THE CASE

Paula Datesh (Complainant) made a complaint alleging that Rebekah Krell, Howard Lazar, and Sharon Page Richie, San Francisco Arts Commission (Respondents), violated provisions of the Sunshine Ordinance by failing to respond to Immediate Disclosure Requests (IDR) in a timely and/or complete manner.

COMPLAINT FILED

On various dates Ms. Datesh filed complaints with the Task Force regarding alleged failure to respond in a timely/and or complete manner.

HEARING ON THE COMPLAINT

On January 20, 2015, the Complaint Committee heard the matter.

Ms. Datesh appeared before the Task Force and presented her claim. File No. 14089 originally consisted of 19 separate complaints regarding the failure to respond to various IDRs. Upon review of the complaints and discussions, Ms. Datesh withdrew 16 of the 19 complaints. The remaining complaints are 14089-4, 14089-5, and 14089-10. In addition to the original complaint, Ms. Datesh believes that the Arts Commission failed to provide assistance to her to identify the requested public records and failed to send a knowledgeable representative to the Complaint Committee meeting.

Rebekah Krell, Deputy Director and CFO, SFAC (Respondent), provided the following response:

14089-4 The SFAC responded to the October 12, 2014, IDR on October 14, 2014. October 12, 2014, was a Sunday and October 13, 2014, was a holiday. The SFAC's responded to the IDR by the end of the next business day in a timely manner.

14089-5 The SFAC responded to the October 20, 2014, IDR on October 23, 2014. The SFAC acknowledges that the response to the IDR was two business days late. However, the Complainant provided incorrect information in the IDR request. The SFAC requested clarifying information to determine if Ms. Datesh wanted the March 14, 2012, or the March 13, 2013 audio recording. A CD and a weblink to the audio of the March 13, 2013, Street Artist meeting was previously provided to Ms. Datesh on March 29, 2013.

14089-10 The SFAC responded to the September 24, 2014, IDR on September 29, 2014. The SFAC acknowledges that their response to the IDR was three business days late. The August 2014 logbooks were provided. However, Ms. Krell stated in her response to the Complainant that the SFAC did not have any records responsive to the request for an audit of the minutes, agendas, and audio recordings of meetings. During the meeting clarification was provided that an "audit" is a computer generated report detailing the dates and times of the online posting of agenda, minutes, and audio recordings. Ms. Krell volunteered to inquire as to the possibility of generating such an audit report.

FINDINGS OF FACT AND CONCLUSION OF LAW

Based on the testimony and evidence presented, the Complaint Committee found the testimony of the parties to be persuasive and finds Administrative Code (Sunshine Ordinance), Section 67.25(a), to be applicable to Complaint Nos. 14089-5 and 14089-10.

RECOMMENDED DECISION AND PROPOSED ORDER OF DETERMINATIONS

The Complaint Committee recommended that the Task Force accept its determination that the Task Force has jurisdiction and find Rebekah Krell, Howard Lazar, and Sharon Page Richie, SFAC, in violation of Administrative Code (Sunshine Ordinance), Section 67.25(a), for failure to respond to Immediate Disclosure Requests in a timely manner in regards to Complaint Nos. 14089-5 and 14089-10. The Complaint Committee further recommends that a referral to committee for oversight/compliance is not justified and that the matter be concluded.

On February 4, 2015, the Sunshine Ordinance Task Force reviewed and adopted the recommendation of the Compliance and Amendments Committee by the following vote:

Ayes: 8 - Rumold, Chopra, Pilpel, David, Fischer, Hinze, Hyland, Washburn
Noes: 0 - None
Absent: 3 - Hepner, Winston, Wolf

Allyson Washburn, Chair
Sunshine Ordinance Task Force

c. Members Sunshine Ordinance Task Force
Nicholas Colla, Deputy City Attorney
Paula Datesh, Complainant
Rebekah Krell, San Francisco Arts Commission
Howard Lazar, San Francisco Arts Commission
Sharon Page-Richie, San Francisco Arts Commission

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ORDER OF DETERMINATION
April 16, 2015

DATE RECOMMENDATION ISSUED
April 1, 2015

CASE TITLE - Ann Treboux v. Rebekah Krell and the San Francisco Arts Commission (File No. 15017)

FACTS OF THE CASE

Ann Treboux (Complainant) made a complaint alleging that Rebekah Krell and the San Francisco Arts Commission violated Administrative Code (Sunshine Ordinance), Section 67.25, by failing to respond to an Immediate Disclosure Request in a timely manner.

COMPLAINT FILED

On February 27, 2015, Ms. Treboux filed a complaint with the Task Force regarding the alleged violation.

HEARING ON THE COMPLAINT

On March 17, 2015, the Complaint Committee heard the matter.

Ms. Treboux provided a summary of the complaint and requested the Task Force to find violations. Ms. Treboux stated that her Immediate Disclosure Request was not reviewed by the San Francisco Arts Commission in a timely manner as the email request was forwarded to a junk email box.

Kate Patterson-Murphy, San Francisco Arts Commission (SFAC)(Respondent) acknowledged that the Immediate Disclosure Request send directly to Ms. Krell (SFAC) was accidently forwarded to Ms. Krell's junk email box. The reason for the misdirection of the email is unknown. However, steps have been taken to be sure that Ms. Treboux's emails to the San Francisco Arts Commission do not get marked as junk e-mail in the future. Upon discovery of the problem, the San Francisco Arts Commission responded to the request on the same day. The SFAC has recently created a general e-mail address to accept public records requests to resolve the problem of requests being sent to employees who are absent for an undetermined time.

FINDINGS OF FACT AND CONCLUSION OF LAW

Based on the testimony and evidence presented, the Complaint Committee finds the testimony of the Complainant to be persuasive and finds Administrative Code (Sunshine Ordinance), Sections 67.25(a), applicable in this case.

RECOMMENDATION

The Complaint Committee recommended that the Sunshine Task Force (SOTF) accept the determination that the SOTF has jurisdiction and that Rebekah Krell and the San Francisco Arts Commission violated Administrative Code (Sunshine Ordinance), Section 67.25(a), for failure to respond an Immediate Disclosure request in a timely manner.

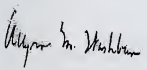
The Complaint Committee further recommends no additional follow-up is required as the San Francisco Arts Commission has already taken steps to correct the problem.

The recommendation was adopted by the Complaint Committee on March 17, 2015, by the following vote:

Ayes: 3 - Rumold, Hinze, Fischer
Noes: 0 - None

On April 1, 2015, the Sunshine Ordinance Task Force reviewed and adopted the Complaint Committee recommendation and found that Rebekah Krell and the San Francisco Arts Commission violated Administrative Code (Sunshine Ordinance), Section 67.25(a), for failure to respond to an Immediate Disclosure Request in a timely manner by the following vote:

Ayes: 8 - Wolf, Pilpel, Hepner, David, Fischer, Hinze, Hyland, Washburn
Noes: 0 - None
Absent: 1 - Chopra



Allyson Washburn, Chair
Sunshine Ordinance Task Force

c. Members, Sunshine Ordinance Task Force
Nicholas Colla, Deputy City Attorney
Ann Treboux, Complainant
Rebekah Krell, San Francisco Arts Commission
Kate Patterson-Murphy, San Francisco Arts Commission

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ORDER OF DETERMINATION
May 18, 2012 (Revised)

DATE THE DECISION ISSUED
February 28, 2012

WILLIAM CLARK v ARTS COMMISSION (CASE NO. 11008)

FACTS OF THE CASE

Complainant William Clark alleged that the San Francisco Arts Commission ("SFAC") violated the Sunshine Ordinance by failing to adequately and timely respond to his February 4, 2011 public records request for the audio recording of the Street Artists Program Committee's regularly scheduled meeting held on January 12, 2011.

COMPLAINT FILED

On February 28, 2011, William Clark filed a complaint with the Sunshine Ordinance Task Force ("Task Force") alleging that the SFAC violated Section 67.21(b) of the Sunshine Ordinance by failing to adequately and timely respond to his public records request for the audio recording of the January 12, 2011 Street Artists Program Committee meeting.

HEARING ON THE COMPLAINT

On February 28, 2012, William Clark appeared before the Task Force and presented his complaint. Julio Mattos, part-time contract clerk for the SFAC, appeared on behalf of the SFAC and presented its response.

Mr. Clark's complaint was first heard by the Task Force on March 22, 2011 and April 26, 2011. The Task Force reconsidered the complaint on February 28, 2012 on the recommendation of the Task Force's Compliance and Amendments Committee.

On February 4, 2011, Mr. Clark submitted a public records request to Howard Lazar, SFAC Street Artists Program Director, for a copy of the audio recording of the regular meeting of the Street Artists Program Committee held on January 12, 2011. Mr. Clark had not received a copy of the requested recording by February 28, 2011, and filed a complaint with the Task Force.

On March 9, 2011, Mr. Lazar sent an email to Mr. Clark with an electronic copy of the requested audio recording attached, and also mailed him three compact disks of the recording. After listening to both versions of the produced recording, Mr. Clark requested to inspect the original audio cassette tape recording because the electronic versions were too poor quality to hear some portions of the meeting.

On March 15, 2011, the SFAC allowed Mr. Clark to listen to the original audio cassette tape recording of the meeting. Mr. Clark alleged that a portion of the meeting was not included on this recording. He stated that a verbal argument between his brother, Robert Clark, and former SFAC Director of Cultural Affairs Luis Cancel occurred during public comment at the meeting, and this was missing from the audio recording. He alleged that either the audio cassette tape that was provided by the SFAC was not the original recording or that the recording had been altered to remove the section containing the argument. He requested the Task Force forward the matter to the District Attorney for investigation.

Mr. Clark stated that the verbal exchange that he alleged was not included on the audio recording of the meeting was also not included in the written minutes of the meeting.

Mr. Lazar responded in writing to Mr. Clark's complaint on March 10, 2011. Mr. Lazar acknowledged the delay in responding to Mr. Clark's public records request, and explained he was unable to timely respond because he was out of the office for two weeks due to illness.

On November 8, 2011, Mr. Lazar appeared before the Task Force's Compliance and Amendments Committee. He admitted that the section containing the verbal argument was missing from the audio recording of the January 12, 2011 Street Artists Program Committee meeting as alleged by Mr. Clark. He stated that the meeting had been recorded on audio cassette tape using a tape recorder, and that the cassette tapes produced to Mr. Clark on March 15, 2011 were the original tapes.

Mr. Lazar further stated that he had not deliberately removed that section from the audio recording or tampered with the cassette tapes in any way. He further stated that he had no explanation for why the section was not included on the audio recordings, and that the tape recording equipment had not malfunctioned during the meeting.

At the Task Force reconsideration hearing on February 28, 2012, Mr. Mattos appeared for the SFAC and stated that he did not know the procedure for audio recording SFAC's committee meetings or reproducing those recordings. He further stated he was unaware if the missing dialogue had been subsequently included in the written minutes of the meeting.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence presented and Mr. Lazar's own admission, the Task Force found that a verbal exchange between Mr. Clark's brother and Mr. Cancel occurred during public comment at the Street Artists Program Committee's regular meeting held on January 12, 2011 and was not included in the audio recording or written minutes of the meeting.

The Task Force further found that the audio recording of the meeting is a public record subject to inspection that "shall not be erased or destroyed" pursuant to Sunshine Ordinance Section 67.14(b).

The Task Force additionally found that Sunshine Ordinance Section 67.16 requires that written minutes of meetings of the SFAC and its standing committees include "a brief summary of each person's statement during the public comment period for each agenda item."

In addition, the Task Force found that Mr. Lazar's failure to acknowledge that a section of the audio recording was missing and failure to include a summary of the missing verbal exchange in the written meeting minutes for eight months after Mr. Clark brought the matter to his attention constitutes willful failure to comply with the Sunshine Ordinance.

DECISION AND ORDER OF DETERMINATION

Pursuant to Sunshine Ordinance Section 67.34, the Task Force finds Howard Lazar in violation of Sunshine Ordinance Sections 67.14(b) for willful failure to provide Mr. Clark with the audio recording of the January 12, 2011 Street Artists Program Committee that is not erased or destroyed, 67.16 for willful failure to include the known missing verbal exchange in the written meeting minutes, and 67.21(e) for willful failure to send a knowledgeable representative to the hearings on Mr. Clark's complaint.

Mr. Lazar shall consult with Mr. Clark to include in the written minutes of the January 12, 2011 Street Artists Program Committee meeting a summary of the verbal exchange missing from the audio recording of the meeting, shall mark audio recordings of the meeting to indicate the section is missing and refer listeners to the minutes, and shall appear before the Compliance and Amendments Committee on Tuesday, June 19, 2012 at 4:00 p.m. in Room 406 at City Hall. The Committee shall monitor compliance with this Order.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on February 28, 2012, by the following vote: (Chair Johnson / Knee)
Ayes: 6 - Snyder, Knee, Manneh, Costa, West, Johnson
Absent: 1 - Cauthen, Chan
Excused: 2 - Washburn, Wolfe

Hope Johnson

Hope Johnson, Chair
Sunshine Ordinance Task Force

cc: William Clark, Complainant
Howard Lazar, Street Artists Program Director, Arts Commission, Respondent
Tom DeCaigny, Director of Cultural Affairs, Arts Commission, Respondent
Jerry Threet, Deputy City Attorney

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ORDER OF DETERMINATION
June 18, 2011

DATE THE DECISION ISSUED
May 18, 2011

WILLIAM CLARK V ARTS COMMISSION (CASE NO. 11023)

FACTS OF THE CASE

Complainant William Clark alleges that the San Francisco Arts Commission ("Commission" or "Respondent") failed to provide public records and public information responsive to his February 21, 2011, request.

COMPLAINT FILED

On March 16, 2011, Mr. Clark filed a complaint against the Arts Commission.

HEARING ON THE COMPLAINT

On May 18, 2011, Mr. Clark presented his case to the Task Force. The Respondent was not present and no one in the audience presented facts or evidence in support of the Respondent. Howard Lazar, Street Artists Program Director for the Commission, had informed the Task Force that he would not be able to attend the meeting.

Mr. Clark told the Task Force that he sent Luis Cancel, the Commission's Director of Cultural Affairs, and Mr. Lazar an email requesting public documents and oral information as to when and why Commission employee Evelyn Russell had her job code changed from 1426 Senior Clerk/Typist to 3541 Curator 1. He said he went to the Department of Human Resources and learned that the transfer involved a substantial pay increase for Ms. Russell. He said he has copies of emails that suggest Ms. Russell's qualifications were manipulated to qualify her as a curator but her work at the Commission is that of a Clerk/Typist. He said he received an email from Mr. Lazar on March 14, 2011, stating that several documents were available for pickup and the copying charge was $3.40. He said Mr. Lazar stated in one of the documents that he was withholding some of the records under California Public Records Act Sections 6254(c) to protect personnel, medical or similar files and 6254(k) to protect records exempted or prohibited from disclosure, and Sunshine Ordinance Section 67.1(g) because of the right to privacy. None of the documents, he said, explained why Ms. Russell's job code was changed and he has not received a verbal explanation. He said Sunshine Ordinance Section 67.24(c)(6) requires the Arts Commission to provide him with the information he requested and by not following the law, Mr. Lazar had violated Section 67.21(b) of the Sunshine Ordinance. He added that street artists are entitled to the information because their fees are helping pay the Commission staff's salaries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Judging from the evidence presented, the Task Force finds that it does not have any evidence to contradict the fact that Ms Russell received a promotion and its associated compensatory package, and the basis of that fact is subject to disclosure.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that the agency violated Sunshine Ordinance Sections 67.24(c)(6) by not disclosing the reason for any performance-based increase in compensation for a staff member, and 67.21(e) by not sending a knowledgeable representative to the meeting. The Mayor, the Board of Supervisors, members of the Arts Commission oversight committee on the Arts Commission are to be notified of the Arts Commission's continued disregard of the requirements of Section 67.21(e), which is to send a knowledgeable representative to Task Force hearings.

The Commission shall release the records requested within 5 business days of the issuance of this Order and shall appear before the Compliance and Amendments Committee on July 12, 2011.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 18, 2011, by the following vote: (Snyder/Wolfe)
Ayes: Snyder, Manneh, Washburn, Costa, Wolfe, Johnson, Knee
Absent: Cauthen
Excused: Knoebber, Chan, West

Richard A. Knee

Richard A. Knee, Chair
Sunshine Ordinance Task Force

c: William Clark, Complainant
Luis Cancel, Respondent
Howard Lazar, Respondent
Jerry Threet, Deputy City Attorney

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February 3, 2012

District Attorney George Gascón
San Francisco District Attorney's Office
Hall of Justice
850 Bryant Street, Room 322
San Francisco, CA 94103

Re: Sunshine Complaint No. 11023, William Clark v. Arts Commission
Notice of Failure to Comply with Order of Determination

The Sunshine Ordinance Task Force ("Task Force") hereby provides notification of Street Artist Program Director Howard Lazar's failure to comply with the Order of Determination ("Order") issued on June 18, 2011 in Sunshine Ordinance Complaint No. 11023, William Clark v. Arts Commission.

This notification is provided in request for appropriate action pursuant to:

(1) Sunshine Ordinance Section 67.21(e) which provides that "[u]pon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request" and "[i]f the custodian refuses or fails to comply with any such order within 5 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance," and

(2) Sunshine Ordinance Section 67.30(c) which provides that "the Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this ordinance or the Acts."

Background

William Clark filed a complaint with the Task Force on March 6, 2011 alleging the San Francisco Arts Commission failed to provide public records and information responsive to his request made February 21, 2011.

UPMC HEALTH SYSTEM

FILED
15 APR 20 PM 4:42
SAN FRANCISCO
ETHICS COMMISSION
BY

Scaife Hall
3550 Terrace Street
Pittsburgh, Pennsylvania 15261
412-647-3118
Fax: 412-647-6222

Department of Medicine

Renal-Electrolyte Division and
Laboratory of Epithelial Cell Biology

March 11, 2013

To Whom It May Concern:

Paula Datesh was admitted to this facility on March 10, 2013.

Please contact 412-522-0494 with any concerns.

MARCH 13, 2012 RESPONSE
NOT GIVEN TO COMMISSIONERS
OR POSTED ON-LINE. DUE PROCESS
VIOLATION.

Hello, my name is Paula Datesh. Until I received this packet of materials on or about February 22nd, I never received ***any*** "notice of warning" about the supposed violations on eight separate days, including December 7 and 11, January 5, 6 and 17, and February 2, 11 and 13.

I have never been convicted of a felony, or even a misdemeanor and have never been on probation. I have no history of violence, substance abuse, and don't take any anti-psychotic medicine. I have never received a ticket from the police or had my Street Artist Program license suspended, despite being in the program off and on, beginning around 1993. I have never sold commercially manufactured goods.

To answer each one of the accusations:

For the **December 7th accusations** (uncertified and commercially manufactured selling items and exceeding display size), there is no documentation about me being in violation of space size regulations or selling items I am not licensed to sell. I have never sold commercially manufactured goods. On that day, the battery of my electronic camera was not functioning. I tried to electronically record Howard Lazar, because I believe he is singling me out for harassment. I believe he continually gossips about me and spreads false information, for instance, that I should be in prison and been a felon in the past. I try to get a record of him gossiping, but have been unsuccessful so far. I have asked him to repeat what I have heard him saying, but he refuses. What I have been told is that Lazar has gone so far as contacting the staff of both the *Yerba Buena Business Improvement District* and the *Union Square BID* and giving them pictures ("mug shots") of me from my license picture which, until recently, were displayed at their offices. The staff of these BIDs said that Lazar has badmouthed and gossiped about me, telling them that they were to ignore me and that I was on probation which is untrue.

For the **December 11th accusation** (selling uncertified metal earrings), there is no proof of this, and I have never sold metal earrings, or again, commercially manufactured goods. According to my memory, I left early that day because I was not making money.

For the **January 5th accusations** (selling in an undesignated space and harassing another street artist), I was not selling outside my designated space. The chair was within my space, not in front of it. In fact, Ralph Anderson threw the chair outside the space, and the police were not called by me. I have never talked to Ralph Anderson, and he stayed in his space until 5:00 or 6:00 pm, not leaving early as this complaint seems to imply. I have been a victim of his gossiping. He told me "You fucking bitch, I am going to run you out of this program. John (referring to John Tunui, the Market Manager) knows all about you." He has told customers and the police that I am dangerous. Anderson told the police that he was afraid to file a complaint, because I would get his address, and that he, for some reason, is afraid of me. The Police laughed at him. I said nothing, until the Police approached me. Anderson's January 9th email to Lazar even states "John Tunui told me she is a convicted felon who has served time in prison." These are the types of abuse that have been brought to my attention by others.

I find the **January 6th accusation** (harassing another street artist and interfering with the business of another artist) particularly bizarre. I believe I was just asking John Tunui a question, instead it is called "taunting." There is no basis for him to make the statement that his customers walked away because of my presence or that, by implication, I interfered with a sale. At other times, John Tunui has called me a "bitch." He has said, "You belong in prison" and "I have a restraining order against you." (the Police could find no record of a restraining order.) At other times, he has said, "I will run you out of this program." I believe these comments show a pattern of abuse of power by the Market Manager. I further believe that he should be relieved of his duties and another person selected as Market Manager.

For the **January 17th accusation** (harassing/disrupting), another bizarre one, I was merely asking him a question about the rules. If there is any harassment or hostility, it is coming from John Tunui. From my previous comments, you can imagine I do not like to deal with John Tunui and feel I am being singled out for abusive treatment.

For the **February 2nd accusation** (harassing/disrupting), I have never said anything to Daniel Hennessy of a "taunting" or "harassing" nature. My display was not in his space. One customer had moved into his space to get a better look at some of my works. When Hennessy complained, I moved

the display to the other side. At one point, the Police showed up in three cop cars (again I did not call them). I suspect that Hennessy left because of the Police, not because of me. In the past, the Police have told Tunui to stop "making stupid 9-1-1 calls," as this one was. The Police have told me to document everything, and I continue to try to document the verbal abuse from John Tunui. In his email, dated February 2nd, he claims I do not approach him or come to his booth, in direct contradiction to his January 6th complaint.

Regarding the **February 11th accusation** (selling in an undesignated space, within 10 feet of an entrance, and exceeding size regulations and selling uncertified items), I never received any warning about this. The documentation submitted by John Tunui is inconclusive and does not adequately link me to the prints shown. Lazar's February 13th logbook assumes that I was in violation and ex post facto tries to make it seem like a "public safety" issue without basis.

Lazar's **February 13th** Logbook, and accusation (obstructing the duty of a staff person), also seems to document a "safety" issue for him. He has accused me of "stalking" him. The fact that I was on the streetcar with him was a coincidence. At the plaza, I was just saying hello to Shan Jian. I have known her for 10 years. He is gossiping about me to LiLi Zhang. Again, I am trying to get documentation, not interfering with any inspection, since his "inspection" or "performance of his duties" consists of gossiping.

If I stand next to him at the Plaza, it is an attempt to get documentation of his gossiping and slandering of me, not being any physical threat to anyone. Also, notice the tone of his other log entries, as opposed to those about me, I suspect he is trying to set me up. There is a pattern here. Lazar's slandering is a threat to me which I have spoken about on many occasions before the *Arts Commission* and their subcommittees. I have been trying to clear my name. The Police have told me to try to get visual documentation of his gossip and slandering. That is what I am trying to do. These accusations are bogus and should not lead to suspension or revocation of my license. I also believe you need to get a new Market Manager for Justin Herman Plaza and send Lazar, at the least, to get better training as a Program Director, if not suspension or termination. I believe he is the source of Tunui's and others' misinformation and ridicule of me. Please do not make his pernicious efforts to undermine my position in the Street

Artists Program succeed. Please renew my license and tell Lazar to cease and desist.

From: Krell, Rebekah <rebekah.krell@sfgov.org>
To: pdatesh <pdatesh@aol.com>
Subject: Re:
Date: Tue, Feb 5, 2013 11:01 am

I agree with you.

Rebekah Krell
Deputy Director & CFO

San Francisco Arts Commission
25 Van Ness Avenue, Suite 345
San Francisco, CA 94102
T: 415-252-4665 F: 415-252-2595
sfartscommission.org

e-Newsletter
<http://visitor.r20.constantcontact.com/manage/optin/ea?v=001WY2H_3RLHWq41R
0dN5CO_A%3D%3D> I Twitter <http://www.twitter.com/SFAC> I Facebook
<http://www.facebook.com/#!/sfacpublicart?ref=ts> I YouTube
<http://www.youtube.com/ArtsCommission> I Flickr
<http://www.flickr.com/photos/sfac>

On 2/5/13 10:00 AM, "pdatesh@aol.com" <pdatesh@aol.com> wrote:

>Just to let you know- I saw the same cop on a MUNI platform a few minutes
>ago.
>He responded to the Saturday Embarcadero incident. I said I did go to the
>full commission
>to mention the problem as I promised I would. He said these stupid 911
>calls reflect
>badly on the street artist program and show a lack of leadership.
>
>It sounded to me as if Mike Addario put a curse on the Commission.
>After so many years of working in the street; dealing with BID's;
>difficult people;
>mentally ill vendors and police- I have learned from experience that it
>is always
>better to come to an understanding in a friendly manner. Mike Addario and
>the
>Clark Brothers are going about this wrong.

TENUKI'S 911 CALLS

From: pdatesh <pdatesh@aol.com>
To: Krell, Rebekah <rebekah.krell@sfgov.org>
Subject: Re:
Date: Mon, Feb 4, 2013 10:53 am

I will be at the Full Commission today.

On Feb 4, 2013, at 10:52 AM, "Krell, Rebekah" <rebekah.krell@sfgov.org> wrote:

> Hello Paula,
>
> I am sorry to learn of this latest incident, and appreciate you letting me
> know. I'll forward your email to the Street Artists program staff and we
> will keep the record in our files.
>
> Best,
>
> Rebekah
>
>
> Rebekah Krell
> Deputy Director & CFO
>
> San Francisco Arts Commission
> 25 Van Ness Avenue, Suite 345
> San Francisco, CA 94102
> T: 415-252-4665 F: 415-252-2595
> sfartscommission.org
>
> e-Newsletter
> <http://visitor1.r20.constantcontact.com/manage/optin/ea?v=001WY2H_3RLHWq41R
> 0dN5CO_A%3D%3D> I Twitter <http://www.twitter.com/SFAC> I Facebook
> <http://www.facebook.com/#!/sfacpublicart?ref=ts> I YouTube
> <http://www.youtube.com/ArtsCommission> I Flickr
> <http://www.flickr.com/photos/sfac>
>
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>
>
>
>
>
>
>
> On 2/3/13 8:38 AM, "pdatesh@aol.com" <pdatesh@aol.com> wrote:
>
>> Daniel Hennessey, has been a street artist in San Francisco of and on for
>> about 10
>> years. He may be mentally ill; too much drug abuse or methadone. He has
>> never
>> been able to put together a few comprehensible sentences and seems to be
>> in
>> another space and time.
>>
>> Today I was in the space next to him. He had 10 by 10 feet for a rickety
>> 4 foot table.
>> He was abusive to my customers and claimed they were trespassing into his
>> space.
>> He ran to the market msnager. I was not questioned. Three SFPd cars came
>> shout
>> 3pm. The market manger claimed he had. No concatenation order against me.
>> When asked to produce it- he was unable and told not to call 911. I
>> showed a
>> Video tape of Hennessey abusing my customers. I said I ignored it. Police
>> did not

>> question him. As they approached, he packed up.
>>
>> As always, Ms, Krell- I was there minding my business and was verbally
>> abused for
>> no reason. Police were called for no reason and the market manager made a
>> claim
>> that he could not support.
>>
>> I have been called names by the market manager for no reason- told, "I
>> belong in jail"
>> and my business was again disrupted.
>>
>> I was told by the police to document everything which I have done through
>> this email.
>> Please contact me if you wish to view the video.
>>
>> Paula
>
>

From: pdatesh <pdatesh@aol.com>
To: Howard Lazar <howard.lazar@sfgov.org>
Subject: Immediate Disclosure Request
Date: Fri, Jan 18, 2013 1:51 am

All documents including recent police reports involving an a statement made by John Tenulu, "you are in big trouble"; "you are getting written up";"they love you in jail", documents relating to the reason why my DMV photo iOS being circulated to various entire in the Downtown area in SF. Documents relating to t an invented incident withers Lycouris claimed I did something to her and I was screamed at by Krelll-Dec.5. Documents relating tan invented incident in which Paterdon called security at 25 Van Ness to the 3rd floor and claimed otherwise at a public hearing.

No response from anyone at SFAC.

These may be communicated via email to this email address.

San Francisco Police Department

REPORTEE FOLLOW-UP

Case Number: 130-109-928

Case numbers are assigned to an investigator based on facts obtained during the initial investigation.

☒ Company A	(Central)	315-2400
☐ Company B	(Southern)	553-1373
☐ Company C	(Bayview)	671-2300
☐ Company D	(Mission)	558-5400
☐ Company E	(Northern)	614-3400
☐ Company F	(Park)	242-3000
☐ Company G	(Richmond)	666-8000
☐ Company H	(Ingleside)	404-4000
☐ Company I	(Taraval)	759-3100
☐ Company J	(Tenderloin)	345-7300

Please contact the investigation unit checked above to provide additional information not available during initial police report.

Information such as:

- Serial numbers of lost or stolen items
- Video evidence of the incident
- Name(s) of possible witness(es) or suspect(s)

ZHOU #4697

Officer's Name and Star No. SFPD105 (rev.03/11)

San Francisco Police Department

REPORTEE FOLLOW-UP

Case Number: 130-109-702

Case numbers are assigned to an investigator based on facts obtained during the initial investigation.

☒ Company A	(Central)	315-2400
☐ Company B	(Southern)	553-1373
☐ Company C	(Bayview)	671-2300
☐ Company D	(Mission)	558-5400
☐ Company E	(Northern)	614-3400
☐ Company F	(Park)	242-3000
☐ Company G	(Richmond)	666-8000
☐ Company H	(Ingleside)	404-4000
☐ Company I	(Taraval)	759-3100
☐ Company J	(Tenderloin)	345-7300

Please contact the investigation unit checked above to provide additional information not available during initial police report.

Information such as:

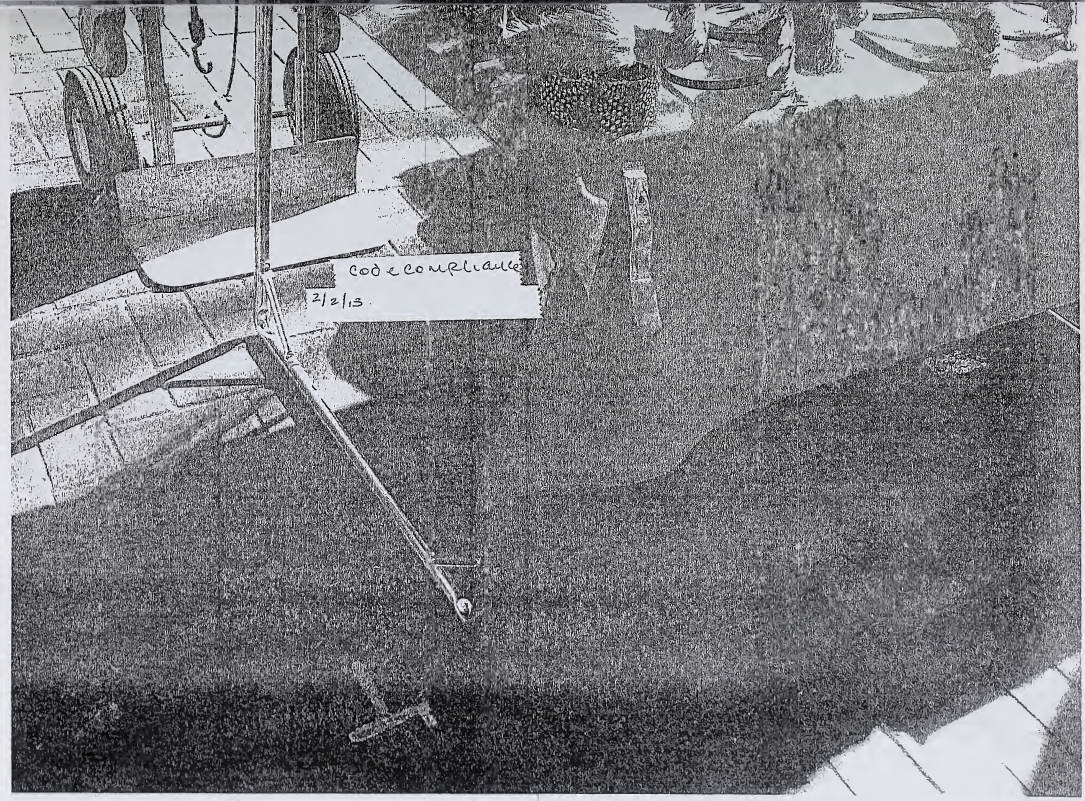
- Serial numbers of lost or stolen items
- Video evidence of the incident
- Name(s) of possible witness(es) or suspect(s)

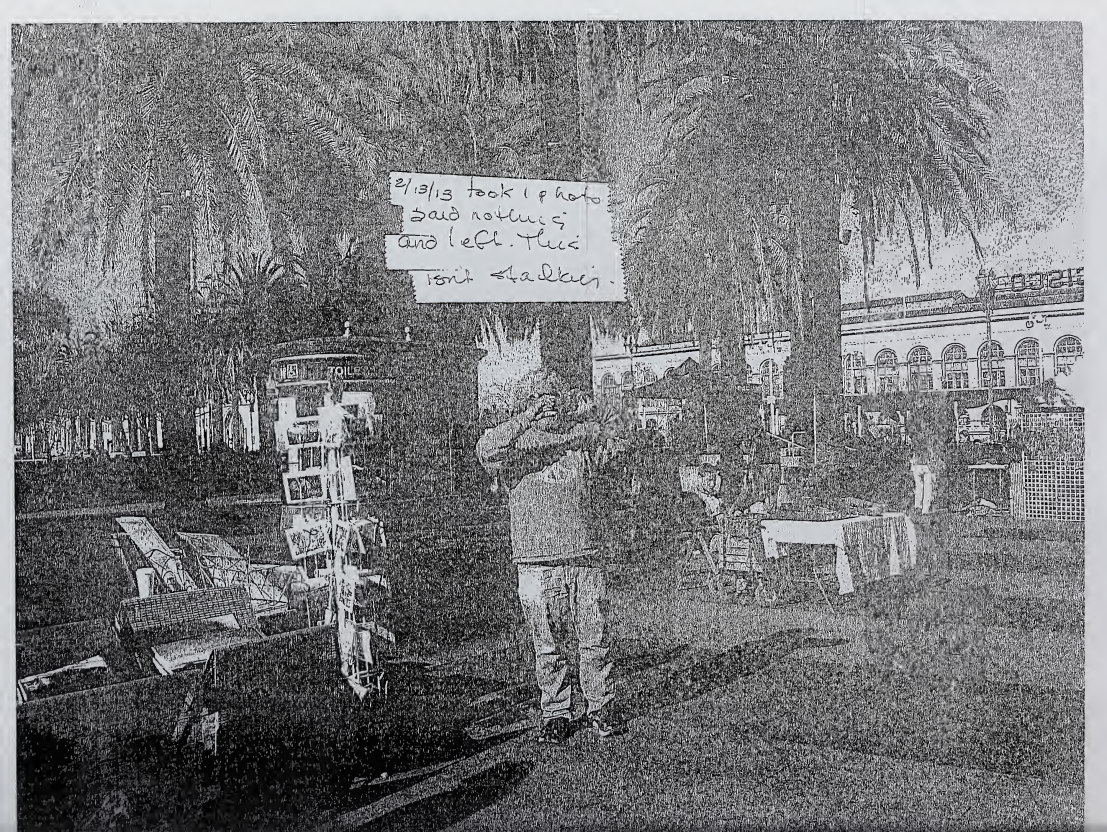
PSA ZHOU #4697

Officer's Name and Star No. SFPD105 (rev.03/11)

2 police reports against John making threatening calls & taken during wife's 5150

Code compliance
1/6/13 I made all of this
and have no problem
being re-screened.


COD E COURTIAULD
2/2/13


2/13/13 took 1 photo
said nothing
and left. Then
Tent started.
TOILET

Someone else
Photo on a
Public Plaza.

Ethics Complaint Number 03-150127

Respondent's Response to the Executive Director's Report and Recommendation

FILED
2015 APR 21 AM 8:11
SAN FRANCISCO
ETHICS COMMISSION
BY

sfac

San Francisco
Arts Commission

Edwin M. Lee
Mayor

Tom DeCaigny
Director of
Cultural Affairs

Programs:
Civic Art Collection
Civic Design Review
Community Arts & Education
Cultural Equity Grants
Public Art
SFAC Galleries
Street Artist Licensing

25 Van Ness Avenue, Ste. 345
San Francisco, CA 94102
tel 415-252-2590
fax 415-252-2595
sfartscommission.org
facebook.com/sfartscommission
twitter.com/SFAC

City and County of
San Francisco

April 20, 2015

John St. Croix, Executive Director
Ethics Commission, City & County of San Francisco
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Complaint 03-150127

Dear Mr. St. Croix:

In response to the complaint referenced above, I am writing to put into context the Arts Commission's decision to withhold the document at issue in this matter, disclosure of which would have identified a person who brought to the Commission's attention a rule violation by another artist. I will outline the structure of the Street Artists program, provide a brief context of the document at issue, and close with an explanation the reasons we withheld the document.

Program Structure

The San Francisco Arts Commission's Street Artist program is staffed by two full-time City employees, who are supervised by the agency's Deputy Director. Mayoral appointed commissioners serve on the Street Artists committee and provide oversight of the program, while an advisory committee, also comprised of Mayoral appointees, screens artists and assists with enforcement. The program is governed by the Street Artists ordinance, (Section 24 of the San Francisco Police Code), which was passed by the voters on November 4, 1975, as Proposition L.

The Program Director and advisory committee members are in the field every day inspecting artists' wares and ensuring compliance with program regulations. When they observe that Artists are out of compliance, the Director first issues verbal and written warnings and may hold a hearing before the Street Artists committee. The hearing includes testimony from witnesses. The Commission may then choose to suspend or revoke a license, and its decision may be appealed at the Permit Appeals Board.

History of Acrimony and Hostility

Because of a few participants in the Street Artists Program, there is a long history of acrimony and a culture of hostility with some of the Artists, including harassment by artists of other artists, staff, and commissioners. The Program Director frequently investigates complaints, mediates conflicts, and resolves disputes that arise between and among artists and other vendors, City staff, and members of the public. Competition for limited profitable spaces, as well as working in very close proximity on busy sidewalks and in active public areas create an environment rife with potential disruption and disagreement. The artists, most of whom are extremely low-income, and many of whom are recent immigrants with limited to no English language proficiency, are a vulnerable population.

Withholding Complainant Identity

Within this context, it is of paramount importance that Arts Commission staff retain the authority to use their judgment and discretion in protecting the identity of a complainant, both during an investigation, and in managing day-to-day operations, in order to ensure a peaceful working environment, and the well being of program participants and their property. In this particular instance, as already noted in your report, the document in question (an email conversation between a street artist and the Program Director) could not be partially redacted without disclosing the identity of the author. In addition, the complainant expressed fear of retaliation and requested in writing the document not be shared, after experiencing harassment by the requestor.

When deciding whether to disclose the document at issue, we considered the real concern both that we have and that the complainant expressed. If the Arts Commission cannot withhold the identity of complainants, a primary source of information necessary for the Program Director's enforcement proceedings will disappear due to the complainant's fear of retaliation. And, given the history of this Program, such fear is real. We therefore believe that we should be able to continue to consider these factors in making a determination of whether to disclose a document pursuant to a public records request.

Sincerely,

Rebekah Krell
Deputy Director & CFO

cc: Tom DeCaigny, Director of Cultural Affairs
Margaret Baumgartner, Deputy City Attorney

Ethics Complaint Number 03-150127

Letter from the Office of the City Attorney

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

BURK E. DELVENTHAL
Deputy City Attorney

Direct Dial: (415) 554-4650
Email: buck.delventhal@sfgov.org

April 20, 2015

FILED
SAN FRANCISCO
ETHICS COMMISSION
2015 APR 20 PM 3:52

By U.S. Mail and E-mail (ethics.commission@sfgov.org)

Honorable Paul A. Renne, Chairperson
Honorable Members, San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102-6053

Re: Ethics Commission Complaint No. 03-150127
Paula Datesh, Complainant
Rebekah Krell/Arts Commission, Respondent

Dear Chairperson Renne and Honorable Commission Members:

The City Attorney's Office takes note of the staff report in this matter, "Report and Recommendation Ethics Commission Complaint No. 03-150127," dated April 8, 2015. We submit this letter to provide advice on an issue of general importance to City government that the staff report raises: Whether the City may rely on California Evidence Code Sections 1041 and 1040, the "identity of informer" and "official information" privileges, to withhold records in response to a public records request. As indicated in the City Attorney's *Good Government Guide*, our office has consistently and widely advised City agencies that the Sunshine Ordinance does not affect the ability of the City to rely on each of these privileges, where applicable, in denying access to public records.[1]

Background

The Public Records Act protects from disclosure "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including but not limited to, provisions of the Evidence Code relating to privilege." (Cal. Gov. Code § 6254(k).) Two such provisions are the identity of informer privilege (Cal. Evid. Code § 1041) and the official information privilege (Cal. Evid. Code § 1040). The Act cross-references these Evidence Code sections in its listing of more than 500 California statutes that protect records from disclosure. (Cal. Gov. Code § 6276.32.)

The Sunshine Ordinance does not specifically preclude the City from relying on the identity of informer and official information privileges as grounds for declining to disclose a record in

[1] The staff report, at page 2, states that the Commission, under its own rules, may have discretion to dismiss the complaint without addressing its merits. Not knowing if the Commission will exercise that option, we submit this letter addressing the two privileges in the event the Commission considers the merits.

response to a public records request. Nevertheless, the staff report concludes, at page 7, that Section 67.24(i) of the Sunshine Ordinance (S.F. Admin. Code § 67.24(i)) "may" have that effect, and therefore recommends that the Commission find that the Respondent violated the Ordinance – though not willfully – by withholding a public record on the basis of these privileges.

As the staff report acknowledges, at page 5, its conclusion is contrary to the "standing advice" of the Deputy City Attorney advising the Arts Commission. We note that the staff report's recommendation is contrary to the public advice that the City Attorney's Office gives to all City departments, boards, commissions, officials, and employees. The City Attorney's *Good Government Guide,* which explains open government rules that City officials and employees must follow, and which is available on the City Attorney's website, states, at page 102:

> In some circumstances, departments may shield from disclosure the identity of persons complaining to the City about violations of law. Cal. Evidence Code § 1041. Privacy or other grounds may also authorize or require nondisclosure, even where the complaint does not allege a violation of law. Cal. Govt. Code § 6254(c). Substantial public interests often warrant withholding the identity of complainants. When, for example, a tenant complains about a landlord, a neighbor complains about a neighbor, an employee complains about an employer, or a citizen complains about a person making a public disturbance, disclosure of the identity of the complainant, the complaint, and/or the investigation could lead to retaliation against or harassment of the complainant and could also compromise the investigation. Under those circumstances the City may be able to withhold or redact the complaint and record of the investigation. See generally Cal. Evidence Code § 1040.

We elaborate below on these principles.

The Privileges

Identity of Informer Privilege

This privilege extends beyond informants in the criminal law context to those who "furnish[] information ... purporting to disclose a violation of a law ... of a public entity in this state ... in confidence ... to ... [a] representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated ...." (Cal. Evid. Code § 1041.) The privilege applies where "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice ...." (*Id.*) The privilege serves two interrelated functions.

Most obviously, the privilege protects individuals within its ambit from hassle, harassment, threats, retaliation, and potentially even violence (in a very small number of cases, typically impossible to identify in advance). The examples in the *Good Government Guide* of common situations outside of the criminal law context that are fraught with these possibilities illustrate the principle that persons who, in a non-public way, report suspected violations of law to responsible City officials should not thereby be subject to possible abuse, or worse, at the hands of those who may be violating the law. The principle applies in the context of many City programs, including the Street Artists Program, in which permittees operate in close physical proximity to one

another and the public, and City officials responsible for the Program receive complaints or other information about permittees' suspected violations from those with whom they interact.

When invoking the identity of informer privilege, the City is protecting those individuals who have come forward with information regarding violations of the law from the ire of persons the informer identified. The City must take seriously the protection of the personal interests of the informer. But the City's interest in maintaining the anonymity of such individuals extends beyond its protective role. It is a virtual certainty that administration and enforcement of numerous City programs, including but by no means limited to the Street Artists Program, would suffer if the identities of persons complaining or otherwise supplying information of violations of law were customarily made known to the person or entity that is the subject of a complaint or investigation. Important aspects of code enforcement, traffic enforcement, and enforcement of ethics, labor, and landlord-tenant laws, to name a few examples, would suffer under such a legal regime. In some cases, possible wrongdoing would never be uncovered, in other cases investigations of wrongdoing would be hindered because people would be reluctant to come forward and initiate a complaint, or cooperate with an investigation.

Official Information Privilege

Under the identity of informer privilege, an entire record may be withheld if disclosure of the contents of the record would effectively enable the object of the complaint to identify the source of the information. (*People v. Galland* (2008) 45 Cal.4th 354, 364.) In such a circumstance, the City agency would not be required to rely on the official information privilege. Nevertheless, because the availability of the official information privilege and the identity of informer privilege under the Sunshine Ordinance presents similar questions and because the staff report addresses the official information privilege, this letter does so as well, though only briefly.

The official information privilege covers information acquired in confidence by the City where "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice...." (Cal. Evid. Code § 1040.) Probably the most important function of this privilege is to protect the integrity and efficacy of active governmental investigations. Courts have repeatedly recognized this function of the privilege. (*People v. Jackson* (2003) 110 Cal.App.4th 280, 287; *Suarez v. Office of Administrative Hearings* (2004) 123 Cal.App.4th 1191, 1194-95.) If the City were unable to invoke this privilege in response to a public records request, and other exemptions (such as the law enforcement investigative records exemption in the Public Records Act, Cal. Evid. Code § 6254(f)) were inapplicable, then persons the City is investigating, and witnesses with information pertaining to the investigation, could use knowledge gained through a public records request to undermine or subvert an active investigation.

The official information privilege serves other important, though limited, functions. For example, in some cases, to obtain a company's proprietary information necessary to the City's use of a technology to assist its administrative functions or to obtain a researcher's raw data, a City department may find it necessary to acquire the information in confidence by promising to protect it from disclosure to the extent permitted by law.

The Sunshine Ordinance

Section 67.24(i) of the Sunshine Ordinance states:

> Neither the City, nor any office [sic], employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act [sic] that is not forbidden by this ordinance.

The staff report, at page 7, concludes that Section 67.24(i) – which the report acknowledges is ambiguous – precludes the City from relying on the identity of informer and official information privileges to withhold records in response to a public records request. The City Attorney's Office has reached a contrary conclusion.

To begin with, it is not clear that Section 67.24(i), concerning "exemption[s]," was intended to apply to evidentiary privileges. An evidentiary privilege is not ordinarily thought of as an exemption. Rather, it is one of many State laws that gain their force from provisions external to the Public Records Act. Many but not all of these laws are listed for reference purposes at the end of the Act. (Cal. Gov. Code §§ 6276 et seq.) Many of these laws, such as the identity of informer and official information privileges, predate the Act. Section 6254(k) of the Act does not create these evidentiary privileges and other confidentiality laws or establish them as exemptions; rather, it makes clear that the Act does not supersede them and automatically require that records encompassed within evidentiary privileges or protected from disclosure by other confidentiality laws be disclosed in response to a public records request.

But if one does consider evidentiary privileges or Section 6254(k) of the Public Records Act to be "exemptions," they are, in the words of the second sentence of Section 67.24(i), "not forbidden by [the Sunshine Ordinance]." They thus stand in sharp contrast to specific exemptions the use of which the Ordinance prohibits or limits. (*E.g.*, S.F. Admin. Code §§ 67.24(g) (prohibiting use of "catch-all" balancing exemption, Cal. Gov. Code § 6255); 67.24(h) (prohibiting use of a deliberative process exemption); 67.24(a) (limiting use of draft memoranda exemption, Cal. Gov. Code § 67.24(a)); 67.24(c) (limiting use of personnel records exemption, Cal. Gov. Code § 6254(c)); 67.24(d) (limiting use of law enforcement investigative records exemption, Cal. Gov. Code § 67.24(f)).) Unlike its treatment of these exemptions, the Sunshine Ordinance evinces no obvious legislative intent to dispense with or limit the identity of informer and official information privileges in a public records context.

The staff report bases its conclusion that Section 67.24(i) embodies an intent to prohibit the use of the two evidentiary privileges in the public records context on the theory that the balancing test called for under the two privileges is akin to the catch-all balancing test in Section 6255 of the Public Records Act (Cal. Gov. Code § 6255) ("the public interest served by not disclosing the record clearly outweighs the public interest served by disclosing the record")), which the City may not use to prevent access to a record. But the analogy is not apt:

- The catch-all balance can apply to any public record not encompassed within an exemption; to types of records the Legislature has never determined should be withheld from the public. Section 6255 thus gives to public entities broad discretion to decide for themselves what types of records may qualify for withholding under its balancing test.

- Under the catch-all balance, there are no limits on what considerations may go into the balance. Section 6255 thus gives to public entities broad latitude to invoke its exemption.

- Because of the open-ended nature of the catch-all balance, the justification for withholding a record on that basis may and often will be a post hoc justification.

For these reasons, one might conclude that a public entity could abuse or over-use the catch-all balance and thereby endanger the open government regime the Public Records Act establishes. But the identity of informer and official information privileges are much more circumscribed than Section 6255's catch-all balance, and thus do not pose the same perceived danger to open government that presumably underlies the Sunshine Ordinance's ban on using the catch-all balance to deny access to a public record.

The identity of informer privilege encompasses a narrow category of records – those which identify persons who in a non-public way have informed City officials about suspected violations of law. Further, the public interests justifying withholding a record under this privilege are, as a practical matter, relatively limited; in almost all circumstances they will be one or both of those mentioned earlier – to protect the individuals reporting a suspected violation of law, and to ensure the effectiveness of enforcement efforts that depend in part on receiving complaints or other information from such individuals. Indeed, the first of these two interests – protecting the individuals involved – is as much a private interest as a public one.

The official information privilege encompasses only records the City has acquired in confidence, and, as a practical matter, has particular application in discrete contexts, such as records of active investigations, where there often will be an obvious public interest in withholding records to ensure the integrity of the investigation.

Courts strongly disfavor repeals by implication; that is, finding that one law has repealed another law without having expressly said so. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476-77.) Further, if there is a conflict between a specific provision of law and a general provision, courts typically find that the specific provision controls, whether or not enacted first. (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588.) And courts disfavor construction of ambiguous laws in derogation of sovereignty. (*Eden Memorial Park Ass'n v. Superior Court* (1961) 189 Cal. App. 2d 421, 423-24.) The confidential informant and official information privileges are integral to the maintenance of the rule of law, a quintessential sovereign responsibility.

These basic principles of statutory construction aid us in determining the legislative intent behind Section 67.24(i). While the Sunshine Ordinance cannot repeal the Public Records Act, these basic principles would likely give a court pause to conclude that the voters who adopted Section 67.24(i) intended to strip from the City the authority to rely on such longstanding policies that serve important purposes that predate and stand apart from the objectives of either the Act or the Ordinance. Therefore a court would be reluctant to conclude that the Sunshine Ordinance has

superseded them without making its intent to do so clear.[2] It is for these reasons that absent a clear statement in the Sunshine Ordinance – and Section 67.24(i) is anything but clear – our office has concluded and advised that the Ordinance does not limit the ability of the City to rely on two provisions of the Evidence Code that the Public Records Act specifically recognizes as examples of "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including but not limited to, provisions of the Evidence Code relating to privilege." (Cal. Gov. Code § 6254(k).)

Summary Conclusion

The longstanding advice of the City Attorney's Office is that California Evidence Code Sections 1041 and 1040, the identity of informer and official information privileges, where applicable, may serve as the basis for withholding records in response to a public records request. The Sunshine Ordinance does not preclude the City from relying on these privileges to not disclose a record involving a complaint or other communication that an individual made to responsible City officials about a possible violation of law.

Very truly yours,

DENNIS J. HERRERA
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

cc: Paula Datesh
Rebekah Krell
John St.Croix

[2] A criminal, civil, or administrative proceeding may be commenced following the completion of an investigation of a possible violation of City law; for example, an administrative proceeding to suspend or revoke a City permit. In such proceedings, depending on the facts and circumstances, constitutional principles such as due process, as well as the agency's rules governing the hearing, may in a particular case call for disclosure of information that is within the scope of the identity of informer privilege or official information privilege, or both. This letter does not address disclosure in that context, which is not governed by the Public Records Act but rather by constitutional principles or agency rules that apply to the hearing.

David Pilpel
[redacted]
San Francisco CA [redacted]

FILED
15 APR 21 PM 3:22
SAN FRANCISCO
ETHICS COMMISSION
BY

Chair Paul Renne and Members
Ethics Commission
25 Van Ness Ave Ste 220
San Francisco CA 94102

21 April 2015

Re: Ethics Complaint No. 03-150127 filed by Paula Datesh

Dear Chair Renne and Members,

I write as an individual to provide additional information regarding the subject complaint. This complaint was not made to the Sunshine Ordinance Task Force ("Task Force"); the Task Force has not discussed it and I do not represent the Task Force or either of the parties here.

First, by way of background, I believe that the Complainant here (Paula Datesh / Ann Treboux; she changes her name from time to time for reasons unknown) easily makes more public records requests of the San Francisco Arts Commission than any other person, according to the most recent Sunshine Requests Log that the Arts Commission provided in response to a suggestion from the Task Force to track public records requests and responses. I also understand that it is not uncommon for the Complainant to make multiple public records requests, with back-and-forth follow-up, on any given day. I believe that the Arts Commission tries to timely and completely respond to every request received. When something is occasionally late or lost the Arts Commission has apologized and attempted to avoid repeating that particular error.

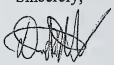
Second, I find it unusual and wasteful for the Ethics Commission to hear this particular complaint in this way. While the Task Force normally hears complaints regarding compliance with the Sunshine Ordinance (and the Complainant files many complaints there, some sustained) and the Task Force refers a small number of complaints to the Ethics Commission for enforcement, this is the first complaint that I know of to be filed directly with the Ethics Commission, bypassing the Task Force. Regardless of the outcome here, I think that this sets a bad precedent by creating a new venue for lodging original complaints. While the Task Force does not always do a perfect job, their complaint process is designed to establish facts, find violations where warranted, and fix practices going forward. I don't think that the Sunshine Ordinance envisioned a more resource-intensive trip to the Ethics Commission every time.

Third, on the merits as to reasons for withholding records, if the Arts Commission did not properly cite the applicable reasons then there may be a violation here. It appears to me that the reasons were fully and properly included, but the legal citation for the withholding may be lacking. If so, then I believe that the Arts Commission should be directed to review with the City Attorney their proper responsibility for citations when withholding public records. Further, if there is a violation here it certainly appears to me that it is not willful in nature.

Fourth, on the merits as to withholding the subject report, I understand that the report is part of an investigatory file within the Street Artist Program. While the Arts Commission is not a traditional law enforcement agency, they do manage certain arts and cultural affairs programs including the Street Artist Program, which includes a comprehensive licensing element with detailed requirements that subject artists in the program to suspension and revocation for failure to comply with program rules. I understand that one aspect of monitoring program compliance is receiving reports from other artists alleging violations which are properly investigated by the Street Artist Program staff. I believe that such reports, while being investigated, must be kept confidential so as not to impair an ongoing investigation. Similar to other investigatory files not otherwise made permanently confidential by law, only when an investigation is complete and no further action will be taken should such files be open to public review. At that time, such reports should be made available, subject to redaction as to information that could reasonably identify the person making the report. If other street artists cannot be assured that their identifying information will be kept permanently confidential they will not make such reports and ensuring compliance with the program requirements will be made that much more difficult. Alternatively, if the report was made with the expectation of confidentiality, then it may be permanently confidential under the California Evidence Code. Again, I see no willful violation here.

Thank you for your time and attention. I believe that the Arts Commission manages the City's arts and cultural affairs programs responsibly along with its public accountability requirements, including public records. I look forward to the hearing on this complaint.

Sincerely,



David Pilpel

cc: John St. Croix, Executive Director

Ethics Complaint Number 03-1501273

Additional Documents Submitted by Respondent for Continuance of Hearing

Members of the Ethics Commission

Case # 030-150157

Additional Documents

FILED
15 MAY -8 PM 12: 18
SAN FRANCISCO
ETHICS COMMISSION
BY

May 7, 2015

The issue to be heard on March 27, 2015 is confidentiality of a witness or informant. I wish to point out that even though Rebekah Krell of the *San Francisco Arts Commission* was found in violation of the Sunshine Ordinance last month (67.21 a) –Howard Lazar has made the same mistake on an incident report of March 15, 2015. He gave the names of two witnesses in his report. See attached documents.

The Sunshine Ordinance was enacted to shine light into SF City Departments with the objective that they do not repeat the same mistake. Howard Lazar continues to repeat the same mistakes. It is likely that he will continue to do so. I do not believe that Ms. Krell can control him. I believe he has been falsifying inspections for 44 years.

I spoke to Wat So, the witness of the January 2 incident. She said she sent a short email to Howard Lazar regarding what she believed to be my photographing her stand. It had nothing to do with being a witness to an, "interfering with staff by blocking my stand" statement. She did not send a second email. I got a notice of warning based on Lazar's falsified logbook and claim of an eye witness.

As I mentioned last month, I met with Krell twice in 2 years. I was told that she would keep an eye on Lazar and I could call when such incidents take place. While it is unfortunate that Ms. Krell was the Custodian of Records and her name will appear on the violation- is Howard Lazar who needs to be held accountable and monitored.

Paula Datesh

FILED
15 MAY -8 PM 12: 18
SAN FRANCISCO
ETHICS COMMISSION

INSPECTOR' S LOGBOOK
WEDNESDAY, MARCH 18, 2015
2:45 – 3:50 p.m.
MARKET STREET CORRIDOR

2:45 p.m., Hallidie Plaza: Sunny, breezy, cool. Inspected the wares of the following artists:

Zhao Mei Pan
Masao Karube
Alejandro Galicia-Chavez
Ismael Morales
Rui Ling Chang
Shu Qi Dong .
Jimmy Sha

3:00 p.m., Market Street, 5th to 4th streets:
M-11: Juan Manuel Alvarez
M-4: Xue You Mai – crocheting
M-3: Juan Kuncar – painting on a sports cap

3:10 p.m., Market Street at Grant Avenue:
No artists

3:15 p.m., Market Street at Sutter Street:
SU-1: Susan Giammona

CONFIDENTIAL

Went to Justin Herman Plaza to interview Jeff Potter as to what he witnessed of the March 15th incident involving Datesh and Tunui. Also spoke to Enrique Perez about the incident.

CONFIDENTIAL

Ended inspection at 3:50 p.m.

Called office for messages.

Called Alyssa to exchange information.

Howard Lazar
Howard Lazar
Street Artists Program Director

INSPECTOR' S LOGBOOK
TUESDAY, MARCH 17, 2015
1:50 – 3:15 p.m.
JUSTIN HERMAN PLAZA

1:50 p.m., Market Street, Spear to Steuart streets: Sunny, breezy; cool. Inspected the wares of the following artists:

Hamlin Liu / Tianmin Yu
Boma Cho

2:00 p.m., Justin Herman Plaza:
Rosibel Arana
Elden Deza
Jonathan Guilliams
Lynn Vandenberg
Mario Hernandez
Enrique Perez
Annie Kuhn
Xiu Shi
John Tunui – responded to my questions regarding the allegations made by Paula Datesh against him regarding a March 15 incident (See attached report).
Linda LaTouche
Erin Cowan
Daniel Hennessey
Shu Rong Li
Wen Zhong Sha
Mahmaz Jafari – making a silver wire and serpentine ring.
Xiang Li
Mei Ling Chen
Vivena Cuyugan
Ron Menninga
Sheila Taylor-Hill
Jacqueline Ryan – all her displayed hats bearing bright St. Patrick's Day greenery.

I was approached by new licensee Vincent Concepcion who told me that he will be at the 6 a.m. lottery tomorrow to get a space, his first day seliing at the Plaza.

Mauricio Trabuco
Mabel Ma
Zhao He Li
(name confidential) – spoke to me about the March 15 incident regarding Paula Datesh's allegations against John Tunui (see attached report with names of witnesses redacted for confidentiality).
Walter Molina

INVESTIGATION OF MARCH 15, 2015 INCIDENT

INTRODUCTORY NOTES

Role of the "Market Manager". In order to maintain a fair and orderly distribution of selling spaces, the street artists unofficially elected one of their peers to act as an unofficial "Market Manager" to (a) run a daily ad hoc lottery for the spaces in Justin Herman Plaza as well as the spaces on Market Street, Steuart to Spear streets; (b) mark the spaces on the pavement/bricks so that the artists can see clearly where they can set up their displays; and (c) work with the Arts Commission's Street Artists Program Director in negotiations with representatives of events, adjacent retail businesses, and the Hyatt hotel in reference to locating and relocating the artists during hours of temporary events, loading and unloading commercial installations, etc.

Several years ago, John Tunui and the Director of the Street Artists Program negotiated with the Hyatt's management with respect to the artists' request to have the "CAFÉ" spaces, as well as the other spaces adjacent to the hotel, designated by the Board of Supervisors for street artist usage. The management personnel agreed to not challenge our request so long as we abided by their wishes to not have the artists in any of the spaces that would be in the way of loading/unloading/fork lift activities. Since that time, the artists, largely through the efforts of John Tunui and the efforts of his predecessor "Market Manager" Tad Sky, have kept to that agreement.

Except for occasional voluntary donations from street artists, the unofficial "Market Manager" receives no City compensation for his services nor is he exempt from possible Arts Commission disciplinary action for any violation of the Street Artists Ordinance.

Procedure for investigating conflicts between street artists. Upon receiving a written complaint of one artist (or several artists) against another artist (or several artists), the Street Artists Program Director may elect to meet with the parties involved in order to resolve the conflict. In lieu of this, the Program Director investigates the site(s) of the alleged incident(s), communicates with the complainant and the accused, communicates with witnesses, examines relevant documents or other physical material as possible evidence, and drafts a report of the investigation with stated findings and conclusion. The draft report is mailed to all parties involved for additional comments and/or corrections and/or inclusions. The Program Director then issues a final report which is mailed to all parties involved.

If the report finds that a violation has been committed, the violator is then subject to possible disciplinary action by the Arts Commission which may include the following: a letter of warning; a notice to appear for a screening of wares conducted by the Advisory Committee of Street artists and Crafts

Examiners; a notice to appear at a hearing with the Program Director as hearing officer; or a notice to appear at a hearing with the Arts Commissioners of the Street Artists Committee. The outcome of a hearing with the Street Artists Committee may result in acquittal or suspension or revocation of the artist's license ("certificate').

THE INCIDENT

On March 15, 2015, Street Artist Paula Datesh sent an email to Arts Commission Deputy Director Rebekah Krell which stated the following:

"I had first pick at Justin Herman Plaza today. I came to the top of the Embarcadero BART. Tunui came about 9:30am. He called me evil; kicked my Artwork and told people around not to talk to me. I called the police. He lied to them saying he came for a fork lift issue. This needs to stop!"

In reference to the above, on March 17th, Ms. Datesh wrote to Arts Commission Director of Communications Kate Patterson-Murphy: *"What are you doing with the information?" Ms. Patterson-Murphy responded: "We are looking into the matter."*

On March 17th, I visited the Plaza and spoke with Street Artist John Tunui about the incident. I also spoke with two witnesses of the incident.

According to John Tunui:

On Sunday, March 15th, John obtained through the (ad hoc) Justin Herman Plaza lottery space #8, and Paula Datesh obtained space #13 situated across from John's space.

To avoid an encounter with Paula, at about 7:30 a.m., John moved his display from the Plaza and took a space on the Market Street sidewalk ("Café Space #5") opposite the former Noah's Bagels store. Paula then moved to the sidewalk and attempted to take space #101. That morning, however, for the artists' understanding, John had indicated on the map of spaces that space #101 could not be used because the hotel building would be having a fork lift moving back and forth across that area of the sidewalk. Upon seeing Paula attempt to move into the space, John told her to move and gave her the reason.

Paula called the police, officers arrived, and she told them that John had kicked her display and had kicked her, and that this aggravated her diabetic condition.

John denied kicking her and her display, but (according to John) the officer told him: "You know why we're here. This violent behavior against this poor

woman is unacceptable. This constitutes a stay away order." The officer told John to stay away from Paula.

Afterwards, at early afternoon, a female officer arrived and reiterated to John the same message, that a stay away order for him would be proper. John tried to tell the officer his side of the story, but she would not let him speak. Witness #1 (see below) tried to speak on John's behalf, but the officer dismissed what the witness had to say.

The officer told John: "Two years ago you called us to protect you here from another man; now she's [Paula] calling to protect her from *you*. You know better." But (according to John) if the officer had looked at the record, she would have seen that John had called the police for protection against a person named Gary Wyrich who is now in prison for his violent behavior. Nevertheless, the officer told John, "I should handcuff you and put a stay away order on you." In lieu of doing so, the officer told John that he was not to move past where he was.

John abided by the officer's directive. Paula, on the other hand, walked back and forth on the sidewalk for the rest of the day, until about 4:30 p.m.

According to Witness #1 (name to remain confidential; Section 1040(a)(2) of the California Evidence Code allows "A public entity" [e.g., the Arts Commission] "a privilege to refuse to disclose official information ... if the privilege is claimed by a person authorized by the public entity to do so and: (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice ..."):

Witness #1 stated that he witnessed the entire incident from the time John moved out of his Plaza space to the sidewalk space, John speaking to Paula, and the police arriving on both occasions and not accepting John's or the witness's story. **Witness #1 stated that at no time did John kick Paula or her display.**

Witness #1 stated that he was "shocked" that the police automatically took the side "of someone transgressing the rules" and that it was John's job [as street artist-elected Market Manager] to ask her to move out of the forklift area. "But they didn't hear the other side of the story; the woman officer was in his face." Witness #1 further stated, in a March 22, 2015 email to Howard Lazar, that *"I still wish the officer tried to get John's side of what happened. The lady [Paula Datesh] sold her lies well."*

According to Witness #2 (name to remain confidential; see note above with regard to the confidentiality of witnesses):

Witness #2 stated that during the afternoon of March 15th he was approached by a female police officer who said she was looking for John Tunui because there was a complaint against him. Witness #2 directed the officer to where John was set up and told the officer that the problem was not John, that it was about Paula Datesh who causes trouble for all the artists at the Plaza, and that John only does his job trying to have the artists comply with their simple rules.

Witness #2 stated he saw the officer confront John, speak sternly at him, told him he was not to move away from his space, and would not let him explain that he was trying to keep the area open so that the hotel's fork lift activity would not be impeded by the artists.

Further clarification from Paula Datesh:

On March 20, 2015, Paula Datesh, writing as "Ann Treboux", sent an email to Kate Patterson stating: *"I went to the lottery at Justin Herman Plaza. I had not been there to work for over 2 years. I did not walk through the area during the same time period.*

"I had #1 at the lottery and went to the top of the Embarcadero BART. At about 9:30am John Tunui came up. He said, "Ignore her. She is evil". He kicked my Artwork and left. I called the non emergency SFPD number. Two cars came from the Southern Station. For some reason, he was hanging around my area when his space was near the plaza-almost ¾ of a block away. I explained what he did. I also said I was diabetic and his actions were causing me distress. Tune[Tunui] claimed he was there to tell me about a fork lift. I said, there was a fork lift but ¾ of a block away. SFPD spoke to the people around who confirmed what Tunui did. He was advised to stay to his area and it[if] he has some announcement to send someone else.

"Sometime later Tunui returned. He taunted me to, 'call 911. His friend Richard Ernst is waiting for my call'. I again said nothing and called SFPD Godfrey. She came from Central Station. We spoke, she ran his name and went to speak to him. He was advised to stay away from me. He claimed, 'he didn't like me'.

"Sometime later, Tunui returned. He blew kisses and left."...

Further clarification from John Tunui:

On March 19, 2015, John Tunui sent an email to Howard Lazar stating: *"Correction to my earlier email: ...*

"1. I moved from space 8 to [space] CAFE 7.

"2. Paula crossed her name off space 13 and moved her display to CAFÉ 101 but she didn't put her name on in CAFÉ 101 on the map."

[John Tunui supplied photocopies of the map, the artists' number sheet, and an email from the Hyatt regency hotel to John Tunui requesting that on March 15th the artists vacate the spaces that would be adversely affected by then hotel's loading and unloading activities, and an earlier email (November 22, 2013) sent by the hotel to John Tunui informing him of a similar request for the artists to accommodate the hotel's loading/unloading activities for November 29-30, 2013.]

"I told her she couldn't set up in CAFÉ 101 because of the fork lifts. She got angry at me and accused me of harassing her but I told her CAFÉ 101 had been crossed off the map. ... It[']s my job to walk through the areas where the forklifts will be operating to make sure all displays are in their spaces, and I saw Paula's display was over the line and told her to correct it, that[']s when she called the police. I never kicked her or touched any part of her body. She was already upset because I made her move from CAFÉ 101. ...

"By the end of the day Walter X arrived after the lottery and set up in space 8 (my first space). Bo Bixler also arrived after the lottery and set up in space 13 (Paula's first space).

"But if you study the map there[']s a lot of changes and that[']s just the way it is. Sunday is more casual, so a lot of people show up later in the day and set up in available spaces without signing the map. ... Or they'll change spaces without changing the map. ..."

OBSERVATIONS

1. Paula Datesh writes that she *"had #1 at the lottery and went to the top of the Embarcadero BART."* John Tunui, however, asserts that, through the lottery, Paula obtained space #13 in the Plaza, not the "Embarcadero BART" area which is a block west of the Plaza; and that it was after John moved his display from the Plaza westward to space "CAFÉ 7" that Paula moved westward (out of the Plaza) attempting to take space "CAFÉ 101".

2. Paula writes that *"For some reason"* John *"was hanging around my area when his space was near the plaza-almost ¾ of a block away."* But John states that, while he obtained Plaza space #8, he moved his display from the Plaza westward to space "CAFÉ 7" in order to avoid Paula who had obtained Plaza space #13 which would

have placed her across from John.

3. Paula writes that John *"kicked my Artwork and left."* According to John, Paula told the police officer that John had kicked her display and had kicked her. Witness #1 stated that at no time did John kick Paula or her display.

4. Paula writes that John *"lied to"* the police *"saying he came for a fork lift issue"*, that he *"claimed he was there to tell me about a fork lift"* and that she told the officer that *"there was a fork lift but ¾ of a block away."* According to John, however, the space that Paula was attempting to move into could not be used because the hotel was about to have fork lift activity across that area of the sidewalk. Witness #1 confirms that it was John's job (as street artist-elected Market Manager) to ask her to move out of the fork lift area. Therefore the fork lift was not *"3/4 of a block away"* as Paula asserts.

5. Paula writes that *"SFPD spoke to the people around who confirmed what Tunui did."* But, according to John, witness #1 tried to speak on John's behalf, but the officer dismissed what the witness had to say. This is corroborated by witness #1 who said that the police did not accept John's or the witness's version of what had happened.

6. Paula writes that John *"was advised"* by the police officer *"to stay to his area"* and that *"Sometime later Tunui returned"* and *"He taunted me to 'call 911' ..."* and *"Sometime later, Tunui returned"* and *"He blew kisses and left. ..."* John, however, asserts that after the officer told him that he was not to move past where he was, he abided by the officer's directive; whereas Paula walked back and forth on the sidewalk for the rest of the day until about 4:30 p.m.

FINDINGS AND CONCLUSION

1. John submitted a photocopy of the day's map of "BART SPACES" and "CAFÉ SPACES" which shows cross-out marks in spaces #101 and #102 and in handwriting the word "FORK LIFT" signifying to the artists that the two spaces were not available for the day. This refutes Paula's allegation that John *"lied to"* the police *"saying he came for a fork lift issue."*

2. While John is not a paid employee or staff member of the Arts Commission exercising legal authority, he demonstrated a conscious effort to make an attempt to (1) stop a street artist from being in harm's way of a fork lift and (2) stop a conflict with the hotel management which required the area to be open for its fork lift activity.

3. Based on a lack of evidence, there is no proof that John "kicked" or in any way touched Paula and/or her display ["Artwork"].

Final report submitted:

Howard Lazar
Street Artists Program Director
Arts Commission

April 14, 2015

See the following ADDENDA of documents submitted by Paula Datesh/Ann

Treboux and John Tunui.

Ethics Complaint Number 03-1501273

Additional Documents Submitted by David Pilpel for Continuance of Hearing

David Pilpel
2151 27th Ave
San Francisco CA 94116-1730

FILED
2015 APR 28 PM 4:38
SAN FRANCISCO
ETHICS COMMISSION
BY

Dennis Herrera, City Attorney
City Attorney's Office
1 Carlton B Goodlett Pl Ste 234
San Francisco CA 94102-4682

April 28, 2015

Re: April 27, 2015 Ethics Commission Meeting

Dear City Attorney Herrera,

I write as an individual regarding last night's Ethics Commission ("Commission") meeting and some advice provided by Deputy City Attorney Joshua White at that meeting regarding Ethics Complaint No. 03-150127 filed by Paula Datesh. The complaint was not made to the Sunshine Ordinance Task Force ("Task Force"), the Task Force has not discussed it, and I do not represent the Task Force or either of the parties in the matter. I provided a letter to the Commission prior to the meeting that was included in the meeting packet; a copy is attached.

During discussion of the subject complaint Commission Member Ben Hur asked if the Commission was unable to make a determination as to whether a particular record sought was public and subject to disclosure without viewing the subject record, could the Commission do so by conducting an in camera review in closed session, and Deputy City Attorney White indicated that the Commission could do so. Following that, the Commission essentially bifurcated the complaint, found a non-willful violation of Administrative Code section 67.27 (a) and continued the portion of the complaint regarding disclosure of the underlying record to a future meeting.

I think that 3 problematic steps would be required: (1) compel production of the subject record (actually an email) from the Arts Commission to the Ethics Commission in connection with this complaint; (2) provide a copy of the subject record to Ethics Commission members but not the public, so as to maintain confidentiality until and unless it is determined that the record is public and subject to disclosure; and (3) conduct an in camera review in closed session.

As I indicated in my letter to the Commission, hearing complaints directly at the Commission and bypassing the Task Force is itself a problem. The Sunshine Ordinance provides that "Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission." (San Francisco Administrative Code section 67.34) This complaint alleged a willful violation, but not by an elected official or department head, so there really is no authority in the Sunshine Ordinance for the Ethics Commission to even hear the matter. No other provision of the Sunshine Ordinance discusses filing complaints directly with the Commission. Further, the Charter provides that "The commission shall conduct investigations in accordance with this subdivision of alleged violations

of this charter and City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics." (Charter section C3.699-13.) Charter provisions about Commission investigations do not refer to the Sunshine Ordinance or public meeting or public records laws.

The Charter does provide that ". . . the Commission may adopt rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records." (Charter section 15.102.) Thus, the Commission has adopted Regulations for Handling Violations of the Sunshine Ordinance. Finally, the Charter provides that "The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers." (Charter section 15.100.)

First, if the Commission somehow has the power to "investigate" this complaint in a way not countenanced by either the Charter of the Sunshine Ordinance, it could only "require by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers." The Commission has not requested, and did not discuss last night, a subpoena to the Arts Commission to produce the subject record.

Second, since the Regulations for Handling Violations of the Sunshine Ordinance requires a Report and Recommendation from the Executive Director and a public hearing on a complaint, I know of no way to provide a record to Commission members but not the public in connection with that item. Both the Commission staff and the City Attorney asserted at last night's meeting that the Commission staff's characterization of the subject record should suffice.

Third, I know of no way to hold an in camera review in closed session at a Commission meeting. The Ralph M. Brown Act ("Brown Act") provides that "Except as expressly authorized by this chapter . . . no closed session may be held by any legislative body of any local agency." (California Government Code section 54962.) The Brown Act only provides for in camera review of a closed session recording in a court proceeding alleging that a violation of the Brown Act has occurred in a closed session that has been recorded pursuant to that section. (California Government Code section 54960.) Meanwhile, the California Public Records Act only provides for in camera review of a public record in a court proceeding to determine if the record is subject to disclosure. (California Government Code section 6259.) No closed session is authorized for an in camera review of a record to determine if the record is subject to disclosure.

Moreover, the Task Force is confronted frequently with the difficult task of determining if a record is subject to disclosure. The Task Force has never been told that it has the power to compel production, provide the record to Task Force members but not the public, and hold an in camera review in closed session to determine if the record is subject to disclosure. I suspect that the Task Force has never been given this option because the Sunshine Ordinance does not allow it. The Board of Supervisors, in enacting and amending the Sunshine Ordinance, or the voters, in amending it significantly in 1999, did not confer such power on the Task Force. Similarly, the Commission could have such power but does not. Both the Brown Act and the California Public Records Act have narrow provisions for in camera review in court proceedings and no provisions for such review at public meetings. The Sunshine Ordinance has no provisions about this at all.

While it may be easy to argue that in order to perform a duty or function these powers are somehow inherent, that argument is dangerous and flawed. I'm sure someone has said that government power is not unlimited and that the laws and the voters allocate powers and duties. Here, I think the Commission is without power to address the instant complaint, which should be properly re-directed to the Task Force or the City Attorney's Supervisor of Records function. At a minimum, I think the Commission has no power or mechanism to compel production, provide the record to Commission members but not the public, and hold an in camera review in closed session to determine if the record is subject to disclosure. I urge you to reconsider the advice given by Deputy City Attorney White last night and to be more circumspect with future advice.

Thank you for your time and attention. I look forward to a proper response to this letter.

Sincerely,

David Pilpel

Attachment

cc: Deputy City Attorney Joshua White, City Attorney's Office
Deputy City Attorney Andrew Shen, City Attorney's Office
Deputy City Attorney Jon Givner, City Attorney's Office
Deputy City Attorney Margaret Baumgartner, City Attorney's Office
Deputy City Attorney Paul Zarefsky, City Attorney's Office
Deputy City Attorney Buck Delventhal, City Attorney's Office
Chief Assistant City Attorney Jesse Smith, City Attorney's Office
Chief Deputy City Attorney Ron Flynn, City Attorney's Office
Chair Paul Renne and Members, Ethics Commission
Executive Director John St. Croix, Ethics Commission
Deputy Executive Director Jesse Mainardi, Ethics Commission
Investigator / Legal Analyst Garrett Chatfield, Ethics Commission

David Pilpel
[redacted]
San Francisco CA [redacted]

FILED
15 APR 21 PM 3:22
SAN FRANCISCO
ETHICS COMMISSION
BY:

Chair Paul Renne and Members
Ethics Commission
25 Van Ness Ave Ste 220
San Francisco CA 94102

21 April 2015

Re: Ethics Complaint No. 03-150127 filed by Paula Datesh

Dear Chair Renne and Members,

I write as an individual to provide additional information regarding the subject complaint. This complaint was not made to the Sunshine Ordinance Task Force ("Task Force"); the Task Force has not discussed it and I do not represent the Task Force or either of the parties here.

First, by way of background, I believe that the Complainant here (Paula Datesh / Ann Treboux; she changes her name from time to time for reasons unknown) easily makes more public records requests of the San Francisco Arts Commission than any other person, according to the most recent Sunshine Requests Log that the Arts Commission provided in response to a suggestion from the Task Force to track public records requests and responses. I also understand that it is not uncommon for the Complainant to make multiple public records requests, with back-and-forth follow-up, on any given day. I believe that the Arts Commission tries to timely and completely respond to every request received. When something is occasionally late or lost the Arts Commission has apologized and attempted to avoid repeating that particular error.

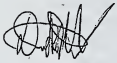
Second, I find it unusual and wasteful for the Ethics Commission to hear this particular complaint in this way. While the Task Force normally hears complaints regarding compliance with the Sunshine Ordinance (and the Complainant files many complaints there, some sustained) and the Task Force refers a small number of complaints to the Ethics Commission for enforcement, this is the first complaint that I know of to be filed directly with the Ethics Commission, bypassing the Task Force. Regardless of the outcome here, I think that this sets a bad precedent by creating a new venue for lodging original complaints. While the Task Force does not always do a perfect job, their complaint process is designed to establish facts, find violations where warranted, and fix practices going forward. I don't think that the Sunshine Ordinance envisioned a more resource-intensive trip to the Ethics Commission every time.

Third, on the merits as to reasons for withholding records, if the Arts Commission did not properly cite the applicable reasons then there may be a violation here. It appears to me that the reasons were fully and properly included, but the legal citation for the withholding may be lacking. If so, then I believe that the Arts Commission should be directed to review with the City Attorney their proper responsibility for citations when withholding public records. Further, if there is a violation here it certainly appears to me that it is not willful in nature.

Fourth, on the merits as to withholding the subject report, I understand that the report is part of an investigatory file within the Street Artist Program. While the Arts Commission is not a traditional law enforcement agency, they do manage certain arts and cultural affairs programs including the Street Artist Program, which includes a comprehensive licensing element with detailed requirements that subject artists in the program to suspension and revocation for failure to comply with program rules. I understand that one aspect of monitoring program compliance is receiving reports from other artists alleging violations which are properly investigated by the Street Artist Program staff. I believe that such reports, while being investigated, must be kept confidential so as not to impair an ongoing investigation. Similar to other investigatory files not otherwise made permanently confidential by law, only when an investigation is complete and no further action will be taken should such files be open to public review. At that time, such reports should be made available, subject to redaction as to information that could reasonably identify the person making the report. If other street artists cannot be assured that their identifying information will be kept permanently confidential they will not make such reports and ensuring compliance with the program requirements will be made that much more difficult. Alternatively, if the report was made with the expectation of confidentiality, then it may be permanently confidential under the California Evidence Code. Again, I see no willful violation here.

Thank you for your time and attention. I believe that the Arts Commission manages the City's arts and cultural affairs programs responsibly along with its public accountability requirements, including public records. I look forward to the hearing on this complaint.

Sincerely,



David Pilpel

cc: John St. Croix, Executive Director

City and County of San Francisco

Edwin M. Lee, Mayor

The Department of Human Resources, on behalf of the City and County of San Francisco Ethics Commission (ETH) is soliciting a proposal to assist the Ethics Commission in selecting an Executive Director. The successful firm will undertake a national search for highly qualified candidates, including developing an electronic recruitment brochure, providing outreach and other marketing services, screening the candidates, developing a short list, recommending top candidates, and providing assistance to the Ethics Commission during the interviews. Please submit your proposal via email to brent.lewis@sfgov.org by Tuesday, May, 26, 2015, 12:00 PT.

Background

The San Francisco Ethics Commission was created by voter approval of Proposition K in November 1993. The Commission acts as filing officer for, and auditor of, financial disclosure statements filed by political candidates and committees and designated City and County employees. The Commission assesses fees and penalties for failure to adhere to deadlines and requirements, audits statements to ensure compliance with contribution limits, administers an education program, and produces educational materials. It is empowered to adopt, amend and rescind, as well as, enforce rules and regulations relating to the registration and regulation of campaign consultants and lobbyists. In addition, the Commission investigates ethics complaints, provides advice on ethical matters and publishes statistical reports.

The Ethics Commission is currently seeking an innovative and seasoned Executive Director who is experienced in the drafting and administrating of laws related to campaign finance regulation, lobbyist and campaign consultant activity, conflict of interest and government ethics. This position will require the ability to establish and maintain working relationships with Commission members, elected and appointed officials, staff, other departments and organizations, media and the general public. Additional information on the Ethics Commission can be found at http://www.sfethics.org/ethics/ .

Proposals

Proposals will be evaluated based on the following criteria:

1. Demonstrated experience in recruitment of similar positions,

2. Examples of recent successful recruitments in the government ethics field, including campaign finance regulation and conflict of interest or other relevant areas,

3. Understanding of challenges associated with the selection of an Executive Director and issues in a municipal government structure such as San Francisco,

4. Experience and expertise of the firm's team that will be involved in the recruitment process, and

5. Schedule and cost proposal.

Contact

Questions on the proposal must be submitted in writing to Brent Lewis, Deputy Director at brent.lewis@sfgov.org.

Communications

Interested parties are directed NOT to contact any employees or officials of the City other than those specifically designated in this proposal. Unauthorized contact may be cause for rejection of proposals at the City's sole and absolute discretion.

REPORT ON RECOMMENDATIONS FOR BOTH A REWRITE OF THE LANGUAGE OF PROPOSITION J AND FOR A RESTORATION OF THE COMMISSION'S OVERSIGHT OF "EXPENDITURE LOBBYING" IN BALLOT MEASURES FOR UPCOMING ELECTIONS

At the regular April 27, 2015 meeting of the San Francisco Ethics commission, Chair Paul Renne appointed Commissioner Peter Keane to serve as an ad hoc committee of one to report back to the Commission at its May meeting with an analysis and recommendations relating to the following:

1. What has been the effect of Proposition J on the ability of the Commission to do its job?
2. Should Proposition J be rewritten by the Commission and submitted to the voters of San Francisco in a ballot measure for their approval?
3. Should the oversight of "Expenditure Lobbying" be restored to the Commission's jurisdiction in a ballot measure submitted to the voters of San Francisco for their approval?

After subsequent discussion between Chair Renne and Commissioner Keane, it was decided that the ad hoc Commission should proceed in the following manner:

Because of the short period remaining to get a ballot measure on for the November 2015 election, the Commission should concentrate its time and energies to focus upon getting a measure on this year which restores the Commission's oversight of "Expenditure Lobbying." The more ambitious complete re-write of Proposition J for a ballot measure submission should be undertaken after the Commission has concluded this work relating to the "Expenditure Lobbying" ballot measure. So, a ballot measure relating to the Proposition J rewrite should be targeted for the 2016 election.

Accordingly, this part of the ad hoc committee's report shall be totally devoted to the matter of "Expenditure Lobbying" and a recommended ballot measure restoring the Commission's power to regulate "Expenditure Lobbying".

After the Ethics Commission completes that task, the ad hoc committee will then present the second part of its report, presumably in the late summer or early fall of this year. In that part of the report, the committee will analyze the changes which Proposition J made to the Commission's ability to do its job and will present a proposed ballot initiative or set of initiatives for the November 2016 election.

History

In 2009 the San Francisco Ethics Commission voted to approve a major rewrite of the laws regarding lobbyists. Significant changes were made to the definition of a lobbyist. In 2010 the Board of Supervisors approved the changes and they became law. The changes were made to the San Francisco Campaign and Government Conduct Code; Article II: Lobbying. In effect, the Lobbyist Ordinance which resulted reduced the definitions of the types of lobbyists being regulated from three – individual, organization and expenditure – to a single definition. The new definition relied on a threshold of compensation for lobbying which is that there was at least one contact with a city official.

The result was to eliminate reporting on spending to influence a local decision when it did not involve some actual contact with a city official.

Prior to this change, any spending to influence a local decision by an "expenditure lobbyist" and/or a "business/organizational lobbyist," whether there had contact or not, had to be reported in filings as "payments made to influence local action." In 2009, filings under these categories amounted to $992,914 and in 2008 to $672,797.

The change made San Francisco the only major jurisdiction in California to not require reporting of expenditure lobbying. Sacramento, San Jose, San Diego, Los Angeles and the State of California all require reporting by expenditure lobbyists. Most disturbingly, the change made San Francisco government wide open for "pay to play" political corruption where quid pro quos can be easily delivered indirectly.

Recommendation

The committee recommends that the San Francisco Ethics Commission approve a ballot measure to be placed before the voters in the November 2015 election which restores the Commission's power to regulate "Expenditure lobbying."

Accompanying this report is a fully rewritten proposed draft of San Francisco Campaign and Government Conduct Code; Article II: Lobbying which does that.

Thanks go to the Friends of Ethics and to Larry Bush for their assistance in this effort. Particular thanks go to Oliver Luby for the extensive drafting of the revisions to the lobbyist ordinance.

Respectfully submitted,
May 13, 2015.
Peter Keane, Commissioner.

Proposed Draft:
Rewriting of the San Francisco Campaign and Governmental Conduct Code to restore regulation of expenditure lobbyists.

REDLINED PORTIONS REFLECT THE ADDITION OF EXPENDITURE LOBBYISTS REGULAR LOBBYISTS FROM THE ORIGINAL LANGUAGE ARE NOW REFERRED TO AS CONTACT LOBBYISTS –

ARTICLE II: LOBBYING

Chapter
1. REGULATION OF LOBBYISTS

CHAPTER 1: REGULATION OF LOBBYISTS

Sec. 2.100. Findings.
Sec. 2.105. Definitions.
Sec. 2.106. Lobbying Contacts.
Sec. 2.107. No Conflict with State Bar Act.
Sec. 2.110. Registration and Disclosures; Fees; Termination of Registration.
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Sec. 2.120. Employment of City and County Officers or Employees; Appoin to City and County Office.
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Sec. 2.136. False Information; Duty to Cooperate and Assist.
Sec. 2.140. Powers and Duties of the Ethics Commission.
Sec. 2.145. Administrative and Civil Enforcement and Penalties.
Sec. 2.150. Limitation of Actions.
Sec. 2.155. Severability.

SEC. 2.100. FINDINGS.

(a) The Board of Supervisors finds that public disclosure of the identity and extent of efforts of lobbyists to influence decision-making regarding local legislative and administrative matters is essential to protect public confidence in the responsiveness and representative nature of government officials and institutions. It is the purpose and intent of the Board of Supervisors to impose reasonable registration and disclosure requirements to reveal information about lobbyists' efforts to influence decision-making regarding local legislative and administrative matters.

(b) Corruption and the appearance of corruption in the form of campaign consultants exploiting their influence with City officials on behalf of private interests may erode public confidence in the fairness and impartiality of City governmental decisions. The City

and County of San Francisco has a compelling interest in preventing corruption or the appearance of corruption which could result in such erosion of public confidence. Prohibitions on campaign consultants lobbying current and former clients will protect public confidence in the electoral and governmental processes. It is the purpose and intent of the people of the City and County of San Francisco in enacting this Chapter to prohibit campaign consultants from exploiting or appearing to exploit their influence with City officials on behalf of private interests.
(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 28-04, File No. 031656, App. 2/20/2004; Ord. 235-09, File No. 090833, App. 11/10/2009)
(Derivation: Former Administrative Code Section 16.520; added by Ord. 19-99, App. 2/19/99)

SEC. 2.105. DEFINITIONS.

Whenever used in this Chapter, the following words and phrases shall have the definitions provided in this Section:

"Activity expenses" means any expense incurred or payment made by a lobbyist or a lobbyist's client at the behest of the lobbyist, or arranged by a lobbyist or a lobbyist's client at the behest of the lobbyist, which benefits in whole or in part any: officer of the City and County; candidate for City and County office; aide to a member of the Board of Supervisors; or member of the immediate family or the registered domestic partner of an officer, candidate, or aide to a member of the Board of Supervisors. An expense or payment is not an "activity expense" unless it is incurred or made within three months of a contact with the officer, candidate, or Supervisor's aide who benefits from the expense or payment, or whose immediate family member or registered domestic partner benefits from the expense or payment. "Activity expenses" include honoraria, consulting fees, salaries, and any other thing of value totaling more than $25 in value in a consecutive three-month period, but do not include political contributions.

"Candidate" shall have the same meaning as set forth in Section 1.104 of this Code.

"Client" means the person for whom lobbyist services are performed by a lobbyist.

"Contact Lobbyist" means any individual who (1) makes five or more contacts in a calendar month with officers of the City and County on behalf of the individual's employer; or (2) makes one or more contacts in a calendar month with an officer of the City and County on behalf of any person who pays or who becomes obligated to pay the individual or the individual's employer for lobbyist services. An individual is not a lobbyist if that individual is lobbying on behalf of a business of which the individual owns a 20% or greater share.

"Economic consideration" means any payments, fees, reimbursement for expenses, gifts, or anything else of value, provided that "economic consideration" does not include salary, wages or benefits furnished by a federal, state or local government agency.

"Employee" means any person who receives, reasonably expects to receive, or whose employer is obligated to provide, an Internal Revenue Service Form W-2 wage and tax statement.

"Employer" means any person who provides an Internal Revenue Service Form W-2 wage and tax statement to an employee who performs lobbyist services on behalf of that person.

"Expenditure lobbyist" means any person, other than any government entity, official, or employee acting in an official capacity, who makes or incurs expenditures to influence local legislative or administrative action totaling $5,000 or more within three consecutive calendar months, including but not limited to public relations, media relations, advertising, public outreach, research, investigation, reports, analyses, studies, rewards or gifts (including below-market-rate rent) to a person who regularly seeks to influence local legislative or administrative action, or similar activities, but not including either economic consideration to a lobbyist for lobbying services or expenditures for activities listed

as being exceptions to the definition of "contact" under section 2.106.

"Gift" shall be defined as set forth in the Political Reform Act, Government Code Section 81000 *et seq.*, and the regulations adopted thereunder.

"Lobbyist" means a contact lobbyist or an expenditure lobbyist~~any individual who (1) makes five or more contacts in a calendar month with officers of the City and County on behalf of the individual's employer; or (2) makes one or more contacts in a calendar month with an officer of the City and County on behalf of any person who pays or who becomes obligated to pay the individual or the individual's employer for lobbyist services. An individual is not a lobbyist if that individual is lobbying on behalf of a business of which the individual owns a 20% or greater share~~.

"Lobbyist services" means services rendered for the purpose of influencing local legislative or administrative action, including but not limited to contacts with officers of the City and County of San Francisco.

"Local legislative or administrative action" includes, but is not limited to, the drafting, introduction, consideration, modification, enactment, defeat, approval, veto, granting or denial by any officer of the City and County of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement to use or contract.

"Measure" shall have the same meaning as set forth in Section 1.104 of this Code.

"Officer of the City and County" means any officer identified in Section 3.203 of this Code, as well as any official body composed of such officers. In addition, for purposes of this Chapter, "officer of the City and County" includes (1) members of the Board of Education, Community College Board, First Five Commission, Law Library Board of Trustees, Local Agency Formation Commission, Health Authority Board, Housing Authority Commission, Parking Authority, Relocation Appeals Board, Successor Agency to the former Redevelopment Agency of the

City and County of San Francisco, Oversight Board of the Successor Agency, Successor Agency Commission, Transportation Authority, Workforce Investment San Francisco Board as well as any official body composed of such officers, and any person appointed as the chief executive officer under any such board or commission; (2) the Zoning Administrator, (3) the City Engineer, (4) the County Surveyor, and (5) the Bureau Chief of the Department of Public Works' Bureau of Street Use and Mapping.

"Person" means an individual, partnership, corporation, association, firm, labor union or other organization or entity, however organized.

"Public hearing" means any open, noticed proceeding.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 280-08, File No. 081285, App. 12/5/2008; Ord. 235-09, File No. 090833, App. 11/10/2009; Ord. 98-14 , File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

(Derivation: Former Administrative Code Section 16.521; added by Ord. 19-99, App. 2/19/99)

SEC. 2.106. LOBBYING CONTACTS.

(a) Whenever used in this Chapter, "contact" means any communication, oral or written, including communication made through an agent, associate or employee, for the purpose of influencing local legislative or administrative action, except as provided in Subsections (b) and (c).

(b) The following activities are not "contacts" within the meaning of this Chapter.

(1) A representative of a news media organization gathering news and information or disseminating the same to the public, even if the organization, in the ordinary course of business, publishes news items, editorials or other commentary, or paid advertisements, that urge action upon local legislative or administrative matters;

(2) A person providing oral or written testimony that becomes part of the record of a public hearing; provided, however, that if

the person making the appearance or providing testimony has already qualified as a contact lobbyist under this Chapter and is appearing or testifying on behalf of a client, the contact lobbyist's testimony shall identify the client on whose behalf the contact lobbyist is appearing or testifying;

(3) A person performing a duty or service that can be performed only by an architect or a professional engineer licensed to practice in the State of California;

(4) A person making a speech or producing any publication or other material that is distributed and made available to the public, through radio, television, cable television, or other medium of mass communication;

(5) A person providing written information in response to an oral or written request made by an officer of the City and County, provided that the written information is a public record available for public review;

(6) A person providing oral or written information pursuant to a subpoena, or otherwise compelled by law or regulation;

(7) A person submitting a written petition for local legislative or administrative action, provided that the petition is a public record available for public review;

(8) A person making an oral or written request for a meeting, or any other similar administrative request, if the request does not include an attempt to influence local legislative or administrative action;

(9) A person appearing before an officer of the City and County pursuant to any procedure established by law or regulation for levying an assessment against real property for the construction or maintenance of an improvement;

(10) A person providing purely technical data, analysis, or expertise in the presence of a registered contact lobbyist;

(11) A person distributing to any officer of the City and County any regularly published newsletter or other periodical which is not primarily directed at influencing local legislative or administrative action;

(12) A person disseminating information or material on behalf of an organization or entity to all or a significant segment of the organization's or entity's employees or members;

(13) A person appearing as a party or a representative of a party in an administrative adjudicatory proceeding before a City agency or department;

(14) A person communicating, on behalf of a labor union representing City employees, regarding the establishment, amendment, or interpretation of a collective bargaining agreement or memorandum of understanding with the City, or communicating about a management decision regarding the working conditions of employees represented by a collective bargaining agreement or a memorandum of understanding with the City;

(15) A party or prospective party to a contract providing oral or written information in response to a request for proposals, request for qualifications, or other similar request, provided that the information is directed to the department or official specifically designated in the request to receive such information; negotiating the terms of the contract with the City after being selected to enter into the contract; or communicating in connection with the administration of an existing contract between the party and the City. For the purposes of this Subsection:

(A) A "party or prospective party" includes that party's officers or employees; a subcontractor listed in the contract, bid, or proposal; or that subcontractor's officers or employees. A "party or prospective party" does not include any other agent or associate, including any outside consultant or independent contractor.

(B) Communication "in connection with the administration of an existing contract" includes, but is not limited to, communication regarding: insurance and bonding; contract performance and/or default; requests for in-scope change orders; legislative mandates imposed on contractors by the City and County; payments and invoicing; personnel changes; prevailing wage verification; liquidated damages and other penalties for breach of contract; audits; assignments; and subcontracting.

Communication "in connection with the administration of an existing contract" does not include communication regarding new contracts, or out-of-scope change orders.

(16) An officer or employee of a nonprofit organization or an organization fiscally sponsored by such a nonprofit organization communicating on behalf of their organization. For purposes of this subsection only, "nonprofit organization" means either an organization with tax exempt status under 26 United States Code Section 501(c)(3), or an organization with tax exempt status under 26 United States Code Section 501(c)(4) whose most recent federal tax filing included an IRS Form 990-N or an IRS Form 990-EZ, or an organization whose next federal tax filing is reasonably likely to include an IRS Form 990-N or an IRS Form 990-EZ.

(c) The following activities are not "contacts" for the purpose of determining whether a person qualifies as a contact lobbyist, but are "contacts" for purpose of disclosures required by this Chapter:

(1) A person providing oral information to an officer of the City and County in response to an oral or written request made by that officer;

(2) A person making an oral or written request for the status of an action; and

(3) A person participating in a public interested persons meeting, workshop, or other forum convened by a City agency or department for the purpose of soliciting public input.

(Added by Ord. 98-14 , File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

SEC. 2.107. NO CONFLICT WITH STATE BAR ACT.

Nothing in this Chapter is intended to regulate attorneys engaged in the practice of law under the California State Bar Act, Business and Professions Code sections 6000 *et seq*.

(Added by Ord. 98-14 , File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

SEC. 2.110. REGISTRATION AND

DISCLOSURES; FEES; TERMINATION OF REGISTRATION.

(a) **REGISTRATION OF LOBBYISTS REQUIRED.** Lobbyists shall register with the Ethics Commission and comply with the disclosure requirements imposed by this Chapter. Such registration shall occur no later than five business days of qualifying as a lobbyist, but ~~thea~~ contact lobbyist shall register prior to making any additional contacts with an officer of the City and County of San Francisco and an expenditure lobbyist shall register prior to making any additional expenditures to influence local legislative or administrative action.

(b) **REGISTRATION.** At the time of initial registration each lobbyist shall report to the Ethics Commission the following information:

(1) The name, business address, e-mail address, and business telephone number of the lobbyist;

(2) ~~T~~If the lobbyist is a contact lobbyist, the name, business address, and business telephone number of each client for whom the contact lobbyist is performing lobbyist services;

(3) ~~T~~If the lobbyist is a contact lobbyist, the name, business address, and business telephone number of the contact lobbyist's employer, firm or business affiliation;

(4) If the lobbyist is an expenditure lobbyist, the following information:

(A) If the expenditure lobbyist is an entity, a description of the nature and purpose of the entity, and the name of each person who is an owner, partner or executive officer of the expenditure lobbyist, with the following specifics:

(i) If the expenditure lobbyist is a sole proprietorship, the name of the sole proprietor;

(ii) If the expenditure lobbyist is a corporation, the name of each executive officer and each owner of more than 20 percent of the corporation, including titles such "owner;"

(iii) If the expenditure lobbyist is a partnership or other

business entity, the name of each partner or owner, if the entity has fewer than 10, the partner or owner with the greatest share in the entity, if the entity has 10 or more partners, or the name of the partnership, if neither of the prior two categories applies;

(B) If the expenditure lobbyist is an individual, the name and address of the expenditure lobbyist's employer, if any, and a description of the business activity in which the expenditure lobbyist or his or her employer is engaged; and

(45) Any other information required by the Ethics Commission consistent with the purposes and provisions of this Chapter.

(c) **LOBBYIST DISCLOSURES.** For each calendar month, each lobbyist shall submit the following information no later than the fifteenth calendar day following the end of the month:

(1) ~~T~~If the lobbyist is a contact lobbyist, the name, business address and business telephone number of each person from whom the lobbyist or the lobbyist's employer received or expected to receive economic consideration to influence local legislative or administrative action during the reporting period;

(2) ~~T~~If the lobbyist is a contact lobbyist, the name of each officer of the City and County of San Francisco with whom the lobbyist made a contact during the reporting period;

(3) ~~T~~If the lobbyist is a contact lobbyist, the date on which each contact was made;

(4) The local legislative or administrative action that the lobbyist sought to influence, including, if any, the title and file number of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement, or contract, and the outcome sought by the client, if a contact lobbyist, or by the lobbyist, if an expenditure lobbyist;

(5) ~~T~~If the lobbyist is a contact lobbyist, the client on whose behalf each contact was made;

(6) ~~T~~If the lobbyist is a contact lobbyist, the amount of economic consideration received or expected by the lobbyist or the

lobbyist's employer from each client during the reporting period;

(7) If the lobbyist is an expenditure lobbyist, the total amount of expenditures made during the reporting period for each local legislative or administrative action the expenditure lobbyist sought to influence;

(8) If the lobbyist is an expenditure lobbyist, an itemization of the financial activity that qualifies the expenditure lobbyist as an expenditure lobbyist, including the name, address, occupation (if an individual), and employer or business name (if an individual) of each person to which the expenditure lobbyist provided economic consideration of $1,000 or more, as well as a description of the economic consideration (money, discounted rent, etc.) and a description of the reason for providing the economic consideration;

(~~7~~9) All activity expenses incurred by the lobbyist during the reporting period, including the following information:

(A) The date and amount of each activity expense;

(B) The full name and official position, if any, of the beneficiary of each activity expense, a description of the benefit, and the amount of the benefit;

(C) The full name of the payee of each activity expense if other than the beneficiary;

(D) Whenever a lobbyist is required to report a salary of an individual pursuant to this Subsection, the lobbyist need only disclose whether the total salary payments made to the individual during the reporting period was less than or equal to $250, greater than $250 but less than or equal to $1,000, greater than $1,000 but less than or equal to $10,000, or greater than $10,000.

(~~8~~10) All political contributions of $100 or more made or delivered by the lobbyist or the lobbyist's employer, or made by a client at the behest of the lobbyist or the lobbyist's employer during the reporting period to an officer of the City and County, a candidate for such office, a committee controlled by such officer or candidate, or a committee primarily formed to support or oppose such officer or candidate, or any committee primarily formed to support or oppose a ballot measure to be voted on only in San

Francisco. This report shall include such political contributions arranged by the lobbyist, or for which the lobbyist acted as an agent or intermediary.

The following information regarding each political contribution shall be submitted to the Ethics Commission:

(A) The amount of the contribution;

(B) The name of the contributor;

(C) The date on which the contribution was made;

(D) The contributor's occupation;

(E) The contributor's employer, or if self-employed, the name of the contributor's business; and

(F) The committee to which the contribution was made.

(~~9~~11) For each contact at which a person providing purely technical data, analysis, or expertise was present, as described in 2.106(b)(10), the name, address, employer and area of expertise of the person providing the data, analysis or expertise, if the lobbyist is a contact lobbyist.

(~~10~~12) Any amendments to the lobbyist's registration information required by Subsection (b).

(~~11~~13) Any other information required by the Ethics Commission consistent with the purposes and provisions of this Chapter.

(d) **REGISTRATION AND FILING OF DISCLOSURES BY ORGANIZATIONS.** The Ethics Commission is authorized to establish procedures to permit the registration and filing of contact lobbyist disclosures by a business, firm, or organization on behalf of the individual contact lobbyists employed by those businesses, firms, or organizations.

(e) **FEES; TERMINATION OF REGISTRATION.**

(1) At the time of registration each lobbyist shall pay a fee of $500. On or before every subsequent February 1, each registered lobbyist shall pay an additional fee of $500.

(2) Failure to pay the annual fee by February 1 shall constitute a termination of a lobbyist's registration with the Ethics Commission. The Ethics Commission is also authorized to

establish additional processes for the termination of a lobbyist's registration.

(3) The Ethics Commission shall waive all registration fees for any full-time employee of a tax-exempt organization presenting proof of the organization's tax-exempt status under 26 U.S.C. Section 501(c)(3) or 501(c)(4).

(4) The Ethics Commission shall deposit all fees collected pursuant to this Section in the General Fund of the City and County of San Francisco.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 129-03, File No. 030250, App. 5/30/2003; Ord. 235-09, File No. 090833, App. 11/10/2009; Ord. 98-14 , File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

(Derivation: Former Administrative Code Section 16.522; added by Ord. 40-88, App. 2/18/88; amended by Ord. 386-95, App. 12/14/95; Ord. 390-97, App. 10/17/97; Ord. 19-99, App. 2/19/99)

SEC. 2.115. PROHIBITIONS.

(a) **GIFT LIMIT.** No lobbyist shall make gifts to an officer of the City and County that have a fair market value of more than $25, except for those gifts that would qualify for one of the exemptions under Section 3.216(b) of this Code and its implementing regulations.

(b) **FUTURE EMPLOYMENT.** No lobbyist shall cause or influence the introduction or initiation of any local legislative or administrative action for the purpose of thereafter being employed or retained to secure its granting, denial, confirmation, rejection, passage or defeat.

(c) **FICTITIOUS PERSONS.** No lobbyist shall contact any officer of the City and County in the name of any fictitious person or in the name of any real person, except with the consent of such real person.

(d) **EVASION OF OBLIGATIONS.** No lobbyist shall attempt to evade the obligations imposed by this Chapter through indirect efforts or through the use of agents, associates or employees.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 235-09, File No. 090833, App. 11/10/2009)
(Derivation: Former Administrative Code Section 16.523; added by Ord. 19-99, App. 2/19/99)

SEC. 2.116. LOBBYIST TRAINING.

(a) Each contact lobbyist must complete a lobbyist training session offered by the Ethics Commission within one year of the lobbyist's initial registration. Thereafter, contact lobbyists shall attend additional training sessions as required by the Executive Director, at his or her discretion.

(b) The Ethics Commission shall make lobbyist training sessions available on its website.

(c) On or before the deadline for completing any required lobbyist training session, each contact lobbyist must file a signed declaration with the Ethics Commission stating, under penalty of perjury, that the lobbyist has completed the required training session.

(Added by Ord. 235-09, File No. 090833, App. 11/10/2009; amended by Ord. 98-14 , File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

SEC. 2.117. LOBBYING BY CAMPAIGN CONSULTANTS.

(a) **PROHIBITION.** No campaign consultant, individual who has an ownership interest in the campaign consultant, or an employee of the campaign consultant shall communicate with any officer of the City and County who is a current or former client of the campaign consultant on behalf of another person or entity (other than the City and County) in exchange for economic consideration for the purpose of influencing local legislative or administrative action.

(b) **EXCEPTIONS.**

(1) This prohibition shall not apply to:

(A) an employee of a campaign consultant whose sole duties are clerical; or

(B) an employee of a campaign consultant who did not personally provide campaign consulting services to the officer of the City and County with whom the employee seeks to communicate in order to influence local legislative or administrative action.

(2) The exceptions in Subsection (b)(1) shall not apply to any person who communicates with an officer of the City and County in his or her capacity as an employee of the campaign consultant who is prohibited by Subsection (a) from making the communication.

(c) **DEFINITIONS.** Whenever the following words or phrases are used in this Section, they shall mean:

(1) "Campaign consultant" shall have the same meaning as in Article I, Chapter 5, Section 1.505 of this Code.

(2) "Campaign consulting services" shall have the same meaning as in Article I, Chapter 5, Section 1.505 of this Code.

(3) "Current client" shall mean a person for whom the campaign consultant has filed a client authorization statement pursuant to Article I, Chapter 5, Section 1.515(d) of this Code and not filed a client termination statement pursuant to Article I, Chapter 5, Section 1.515(f) of this Code. If such person is a committee as defined by Section 82013 of the California Government Code, the current client shall be any individual who controls such committee; any candidate that such committee was primarily formed to support; and any proponent or opponent of a ballot measure that the committee is primarily formed to support or oppose.

(4) "Employee" shall mean an individual employed by a campaign consultant, but does not include any individual who has an ownership interest in the campaign consultant that employs them.

(5) "Former client" shall mean a person for whom the campaign consultant has filed a client termination statement pursuant to Article I, Chapter 5, Section 1.515(f) of this Code within the 60 months prior to communicating with the person.

(Added by Ord. 28-04, File No. 031656, App. 2/20/2004; amended by Ord. 239-08, File No. 080162, App. 10/30/2008; Ord. 235-09, File No. 090833, App. 11/10/2009)

SEC. 2.120. EMPLOYMENT OF CITY AND COUNTY OFFICERS OR EMPLOYEES; APPOINTMENT OF EMPLOYEE TO CITY AND COUNTY OFFICE.

(a) **EMPLOYMENT OF CITY AND COUNTY OFFICERS OR EMPLOYEES.** If any lobbyist employs or requests, recommends or causes a client of the lobbyist to employ, and such client does employ, any officer of the City and County, any immediate family member or registered domestic partner of an officer of the City and County, or any person known by such lobbyist to be a full-time employee of the City and County, in any capacity whatsoever, the lobbyist shall file within 10 days after such employment a statement with the Ethics Commission setting out the name of the employee, the date first employed, the nature of the employment duties, and the salary or rate of pay of the employee.

(b) **APPOINTMENT OF EMPLOYEE TO CITY OFFICE.** If an employee of a lobbyist is appointed to City or County office, the lobbyist shall file within 10 days after such appointment a statement with the Ethics Commission setting out the name of the employee, the date first employed, the nature of the employment duties, and the salary or rate of pay of the employee.

(c) **REPORT OF SALARY.** Whenever a filer is required to report the salary of an employee who is also an officer or employee of the City and County pursuant to this Section, the filer need only disclose whether the total salary payments made to the employee are less than or equal to $250, greater than $250 but less than or equal to $1,000, greater than $1,000 but less than or equal to $10,000, or greater than $10,000.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000)

(Derivation: Former Administrative Code Section 16.524; added by Ord. 40-88, App. 2/18/88; amended by Ord. 386-95, App. 12/14/95; Ord. 19-99, App. 2/19/99)

SEC. 2.125. RESERVED.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; repealed by Ord. 235-09, File No. 090833, App. 11/10/2009)
(Derivation: Former Administrative Code Section 16.525; added by Ord. 19-99, App. 2/19/99)

SEC. 2.130. EMPLOYMENT OF UNREGISTERED PERSONS.

It shall be unlawful knowingly to pay any contact lobbyist to contact any officer of the City and County of San Francisco, if said contact lobbyist is required to register under this Chapter and has not done so by the deadlines imposed in this Chapter.
(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 235-09, File No. 090833, App. 11/10/2009)
(Derivation: Former Administrative Code Section 16.526; added by Ord. 40-88, App. 2/18/88; amended by Ord. 19-99, App. 2/19/99)

SEC. 2.135. FILING UNDER PENALTY OF PERJURY; RETENTION OF DOCUMENTS; AUDITS.

(a) All information required under this Chapter shall be submitted to the Ethics Commission, in the format designated by the Commission. The lobbyist shall verify, under penalty of perjury, the accuracy and completeness of the information provided under this Chapter.

(b) The lobbyist shall retain for a period of five years all books, papers and documents necessary to substantiate the registration and disclosure reports required by this Chapter. These records shall include, but not be limited to, copies of all fundraising solicitations sent by the lobbyist or his or her agent for an officer of the City and County, a candidate for such office, a committee controlled by

such officer or candidate, or a committee primarily formed to support or oppose such officer or candidate, or any committee primarily formed to support or oppose a ballot measure to be voted on only in San Francisco.

(c) On an annual basis, the Executive Director shall initiate audits of one or more lobbyists selected at random. At the request of the Executive Director, the Controller may assist in conducting these audits. This requirement shall not restrict the authority of the Executive Director or the Ethics Commission to undertake any other audits or investigations of a lobbyist authorized by law or regulation. Within ten business days of a request by the Ethics Commission, a lobbyist or anyone required to register as a lobbyist shall provide the Ethics Commission with any documents required to be retained under this Section.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 235-09, File No. 090833, App. 11/10/2009; Ord. 98-14, File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

(Derivation: Former Administrative Code Section 16.527; added by Ord. 40-88, App. 2/18/88; amended by Ord. 386-95, App. 12/14/95; Ord. 19-99, App. 2/19/99)

SEC. 2.136. FALSE INFORMATION; DUTY TO COOPERATE AND ASSIST.

(a) **PROHIBITION.** No person shall knowingly and intentionally furnish false or fraudulent evidence, documents, or information to the Ethics Commission, District Attorney or City Attorney, or knowingly and intentionally misrepresent any material fact, or conceal any evidence, documents, or information relevant to an investigation by the Ethics Commission, District Attorney or City Attorney of an alleged violation of this Chapter.

(b) **DUTY TO COOPERATE AND ASSIST.** The Ethics Commission, District Attorney or City Attorney may request and shall receive from every City officer and employee cooperation and assistance with an investigation into an alleged violation of this Chapter.

(Added by Ord. 98-14 , File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

SEC. 2.140. POWERS AND DUTIES OF THE ETHICS COMMISSION.

(a) The Ethics Commission shall prescribe the format for the submission of all information required by this Chapter.

(b) Upon request by the Board of Supervisors or the Mayor, the Ethics Commission shall compile the information submitted pursuant to this Chapter and forward a report of the compiled information to the Board of Supervisors and the Mayor within thirty days of receipt of the request.

(c) Upon request by the Board of Supervisors or the Mayor, the Ethics Commission shall file a report with the Board of Supervisors and the Mayor on the implementation of this Chapter within thirty days of receipt of the request.

(d) The Ethics Commission shall preserve all original reports, statements, and other records required to be kept or filed under this Chapter for a period of five years. Such reports, statements, and records shall constitute a part of the public records of the Ethics Commission and shall be open to public inspection.

(e) The Ethics Commission shall provide formal and informal advice regarding the duties under this Chapter of a person or entity pursuant to the procedures specified in San Francisco Charter Section C3.699-12.

(f) The Ethics Commission shall have the power to adopt all reasonable and necessary rules and regulations for the implementation of this Chapter pursuant to Charter Section 15.102.

(g) The Ethics Commission shall conduct quarterly workshops concerning the laws relating to lobbying.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 235-09, File No. 090833, App. 11/10/2009)

(Derivation: Former Administrative Code Section 16.528; added by Ord. 40-88, App. 2/18/88; amended by Ord. 386-95, App. 12/14/95; Ord. 19-99, App. 2/19/99)

SEC. 2.145. ADMINISTRATIVE AND CIVIL ENFORCEMENT AND PENALTIES.

(a) If any lobbyist fails to submit any information required by this Chapter after any applicable deadline, the Ethics Commission shall, in addition to any other penalties or remedies established in this Chapter, impose a late filing fee of $50 per day after the deadline until the information is received by the Ethics Commission. The Executive Director of the Ethics Commission may reduce or waive a late filing fee if the Executive Director determines that the late filing was not willful and that enforcement will not further the purposes of this Chapter. If such reduction or waiver equals or exceeds $500, the Executive Director shall notify the Commission of his or her determination. Thereafter, any two or more members of the Commission may cause the reduction or waiver to be calendared for consideration by the full Commission in open session at the next Commission meeting occurring no sooner than ten days from the date the Executive Director informs the Commission of the Executive Director's recommendation. A Commissioner's request that a reduction or waiver be calendared must be received by the Executive Director no fewer than five days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements. The Ethics Commission shall deposit funds collected under this Section in the General Fund of the City and County of San Francisco.

(b) Any person who knowingly or negligently violates this Chapter, including but not limited to, by providing inaccurate or incomplete information regarding lobbying activities, may be liable in an administrative proceeding before the Ethics Commission pursuant to Charter Section C3.699-13. In addition to the administrative penalties set forth in the Charter, the Ethics Commission may issue warning letters regarding potential violations of this Chapter both to the lobbyist and the person who pays or employs the lobbyist.

(c) Any person or entity which knowingly or negligently

violates this Chapter may be liable in a civil action brought by the City Attorney for an amount up to $5,000 per violation, or three times the amount not properly reported, or three times the amount given or received in excess of the gift limit, whichever is greater.

(d) In investigating any alleged violation of this Chapter the Ethics Commission and City Attorney shall have the power to inspect all documents required to be maintained under this Chapter. This power to inspect documents is in addition to other powers conferred on the Ethics Commission and City Attorney by the Charter or by ordinance, including the power of subpoena.

(e) **JOINT AND SEVERAL LIABILITY.**

(1) Should two or more persons be responsible for any violation under this Chapter, they may be jointly and severally liable.

(2) The client or employer of a lobbyist shall be jointly and severally liable for all violations of this Chapter committed by the lobbyist in connection with acts or omissions undertaken on behalf of that client or employer.

(3) If a business, firm or organization registers or files lobbyist disclosures on behalf of its employees pursuant to Section 2.110(d), the business, firm or organization may be held jointly and severally liable for any failure to disclose its employees' lobbying activities.

(f) The City Attorney may also bring an action to revoke for up to one year the registration of any lobbyist who has knowingly violated this Chapter.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 129-03, File No. 030250, App. 5/30/2003; Ord. 235-09, File No. 090833, App. 11/10/2009; Ord. 98-14 , File No. 130374, App. 6/26/2014, Eff. 7/26/2014)

(Derivation: Former Administrative Code Section 16.529; added by Ord. 40-88, App. 2/18/88; amended by Ord. 399-94, App. 11/23/94; Ord. 386-95, App. 12/14/95; Ord. 390-97, App. 10/17/97; Ord. 19-99, App. 2/19/99)

SEC. 2.150. LIMITATION OF ACTIONS.

(a) No civil action shall be brought to enforce this Chapter unless brought within four years after the date the cause of action accrued or the date that the facts constituting the cause of action were discovered by the City Attorney. For the purpose of this Subsection, a civil action is brought when the City Attorney files the action in a court of law.

(b) No administrative action alleging a violation of this Chapter and brought under Charter Section C3.699-13 shall be brought more than four years after the date of events which form the basis of the complaint, or the date that the events constituting the basis of the complaint were discovered by the Ethics Commission. For the purpose of this Subsection, a complaint is brought by the Executive Director of the Ethics Commission upon the date of service of the probable cause report.

(c) A civil action brought to enforce or collect penalties or late filing fees imposed under this Chapter shall be brought within four years after the date on which the penalty or late filing fee was imposed. For purposes of this Subsection, a penalty or late filing fee is imposed when the Ethics Commission has issued a final decision in an enforcement action imposing a penalty for a violation of this Chapter or the Ethics Commission or Executive Director has made a final determination regarding the amount of a late filing fee imposed under this Chapter. The Ethics Commission or Executive Director does not make a final determination regarding the amount of a late filing fee imposed under this Chapter until the Ethics Commission or Executive Director has made a determination to accept or refuse any request to waive a late filing fee where such waiver has been timely requested and is expressly authorized by statute, ordinance, or regulation. For the purpose of this Subsection, a civil action is brought when the City Attorney files the action in a court of law.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 235-09, File No. 090833, App. 11/10/2009)

(Derivation: Former Administrative Code Section 16.530; added by Ord. 40-88, App. 2/18/88; amended by Ord. 19-99, App. 2/19/99)

SEC. 2.155. SEVERABILITY.

If any Section, Subsection, subdivision, sentence, clause, phrase or portion of this Chapter, or the application thereof to any person, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Chapter or its application to other persons. The Board of Supervisors hereby declares that it would have adopted this Chapter, and each Section, Subsection, subdivision, sentence, clause, phrase or portion thereof, irrespective of the fact that any one or more Sections, Subsections, subdivisions, sentences, clauses, phrases, or portions, or the application thereof to any person, to be declared invalid or unconstitutional.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000)
(Derivation: Former Administrative Code Section 16.531; added by Ord. 40-88, App. 2/18/88; amended by Ord. 19-99, App. 2/19/99)

SEC. 2.160 [REPEALED.]

(Added by Ord. 222-00, File No. 000741, App. 9/29/2000; repealed by Ord. 235-09, File No. 090833, App. 11/10/2009)

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

PAUL. A. RENNE
CHAIRPERSON

BRETT ANDREWS
VICE-CHAIRPERSON

BEVERLY HAYON
COMMISSIONER

BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

EXECUTIVE DIRECTOR'S REPORT
TO THE SAN FRANCISCO ETHICS COMMISSION
For the Meeting of May 27, 2015.

1. Budget/Staffing.
Staff requested and received a one-time adjustment of $51,111 to its FY 2014-15 budget in order to complete the translation of its publicly-posted documents into Traditional Chinese, Spanish, and Tagalog as required by the City's Language Access Ordinance. Completion of the translations will address the issues raised in a June 2014 Civil Grand Jury Report, which found that the Ethics Commission provides written information only in English, although San Francisco has strong political participation from communities and officials whose first language is not English and who require guides and educational materials relevant to their needs. The report recommended that the Ethics Commission make its guides and education materials available in the City's major languages as is done in other City departments.

The documents that have been selected for translation provide information regarding the Ethics Commission's services and programs. They include, but are not limited to, guides for candidates seeking public office, lobbyists and campaign committees, a manual on governmental ethics laws for public officials and employees, and information about reporting requirements for persons seeking to influence decisions by government officials.

All required budget documents have been submitted. The Mayor's proposed budget is due to be released on June 1, 2015.

2. Investigation and enforcement program.
As of May 15, 2015, there were 19 pending formal complaints alleging violations within the Ethics Commission's jurisdiction.

Category	# of Complaints
Campaign Finance	7
Conflict of Interest	5
Governmental Ethics	1
Lobbyist Ordinance	4
Campaign Consultant Ordinance	0
Sunshine Ordinance	2
TOTAL	**19**

3. Campaign finance disclosure program.

a. Filing deadline. On April 20, 2015, seven committees were added to the Commission's Non-Responsive Filers List for failing to file their required campaign statement for the period ending 12/31/2014, which was due 2/2/2015. The next filing is July 31, 2015 for the First Semi-annual statement, which covers the reporting period ending June 30, 2015. In the interim, staff receives and processes campaign statements for this and other filing deadlines. Staff continues to answer questions from and conduct outreach to candidates and other committee representatives about campaign finance filing obligations.

b. Collection of late filing fees and contribution forfeitures. In the fiscal year 2014 -2015, as of May 15, 2015, the Commission collected $24,378 in late fees and forfeitures. As of May 15, 2015, the Commission's outstanding late fees and forfeitures were $8,111, of which $6,601 is pending at the Bureau of Delinquent Revenues (BDR).

c. Status of accounts to San Francisco Bureau of Delinquent Revenues (BDR). The following chart provides details on active accounts referred to BDR as of May 15, 2015:

#	Committee/ Filer	ID #	Treasurer or Responsible Officer	Date referral effective	Original amount referred	Last month's balance	Current balance (Changes are in bold)	Status
1	Chris Jackson For Community College Board	1347066	Chris Jackson	7/12/13	$6,600.94	$6,600.94	$6,601	Pending at Small Claims Court
						TOTAL	$6,601	

4. Revenues report.

For fiscal year 2014-2015, the Commission was budgeted to generate $70,000 in revenues. As of May 15, 2015, the Commission received $143,016 or 204% of anticipated revenues for the year.

Source	Budgeted Amount FY 14-15	Receipts
Lobbyist Fees	$37,000	$91,500
Other Ethics General	$1,000	$8
Campaign Finance Fines	$23,000	$24,378
Campaign Consultant Fees	$5,000	$14,550
Lobbyist Fines	$1,000	$50
Statements of Economic Interests Fines	$1,000	$1,420
Other Ethics Fines	$1,000	$9,500
Campaign Consultant Fines	$1,000	$1,610
Unallocated	$0	$0
Total	$70,000	$143,016

5. Lobbyist program.
As of May 15, 2015, 139 individual lobbyists were registered with the Commission. Total revenues collected to date for the 2014-2015 fiscal year amount to $91,550, including $91,500 in lobbyist registration fees, and $50 in lobbyist fines. The filing deadline for the next lobbyist disclosure statement is June 15, 2015.

6. Campaign Consultant program.
As of May 18, 2015, 23 campaign consultants were registered with the Commission. $14,550 in registration fees and $1,610 in fines have been collected so far during the 2014-2015 fiscal year.

The next campaign consultant quarterly report deadline is Monday, June 15, 2015, covering the reporting period from March 1, 2015 through May 31, 2015. Staff will send reminders to all active campaign consultants prior to the deadline.

7. Statements of Economic Interests.
As of May 18, 2015, 472 persons (95 percent) have electronically filed their Annual Form 700. Notices about non-filers were sent to filing officers and department heads in the first week of May. Reminders will be sent to filing officers and non-filers the first week of June. Persons who have not filed by July 1, 2015 will be referred automatically to the Fair Political Practices Commission for enforcement.

Fifty-five percent have filed their Annual Sunshine Ordinance Declaration, and 25 percent have filed their Certificate of Ethics training. (The April Executive Director Report failed to correctly state that the percentage of persons who had filed their Certificate of Ethics Training was 17 percent.)

8. Permit Consultant Program
As of May 18, 2015, 21 individuals have registered with the Permit Consultant program. Sixteen Disclosure Reports for the period January 1 to March 31, 2015 have been received. Staff is working with Department of Building Inspection (DBI) personnel to educate permit consultants about the filing requirements. Staff will also be using data from the DBI permit consultant database to identify potential registrants.

9. Outreach and Education.
On Wednesday, May 6, 2015, Deputy Executive Director Jesse Mainardi met with representatives of San Francisco chapter of Represent.US, which seeks to pass and improve anti-corruption laws in cities and states across the United States. The group discussed the state of the City's campaign laws and Represent.US's potential plans.

For the calendar year 2015, staff has scheduled 14 workshops to provide training to campaign committees of their obligations under state and local campaign finance laws. Of the 14 workshops, five will cover requirements pertaining to candidates seeking office in November 2015, five will cover requirements pertaining to ballot measure committees and four will cover requirements pertaining to general purpose committees (also referred to as political action committees). In addition, to the 14 scheduled training workshops, staff will schedule additional training and/or conduct one-on-one training as needed. Separately, on an on-going basis staff

provides training to candidates and campaign treasurers on using the Commission's online electronic filing system, SFEDS.

Additionally, the Commission continues to offer trainings on Statements of Incompatible Activities to City departments via web trainings. The following are web video trainings available on the Commission website:

Department of Building Inspection SIA Training
Controller's Office SIA Training
Department on the Environment SIA Training
Governmental Ethics Ordinance Training for City Employees
Medical Examiner's Office SIA Training
Non-Candidate Recipient Committee Training
Public Utilities Commission SIA Training
SIA Template Language Training

10. Technology

At the February 23, 2015 meeting, the Commission approved regulations to allow public financing applications to be submitted electronically. On May 5, 2015, the Commission released a new component to its electronic filing system to allow candidates for Mayor and Board of Supervisors to submit qualifying and matching funds requests, all supporting documentation, and a variety of other forms related to the public financing program in electronic format. Commission staff will review applications in the new system and send responses back directly into the candidate's filing account. Candidates that use the new public financing component will now only have to data enter contributions once for both public financing and disclosure forms. Candidates currently raising funds in anticipation of applying for the November 2016 election may start to use the new system.

11. Records Requests

The Commission has received 21 records requests since the start of April, over half of which required immediate disclosure of records. Immediate disclosure requests require a response by close of business on the day following the day of the request. Otherwise, public records requests require a response within 10 days. Immediate disclosure requests cause staff to suspend their other regular duties, no matter how important, to research and compile records by the deadline.

In the past two months, it has caused delays in the release of the new public financing system and other planned improvements to the Commission's web site. In addition it has reduced the staff's capacity to work on the Commission's legislative proposals and investigation of complaints and to provide timely support to filers.

12. Staff Project Calendar.

The staff project calendar for 2015 which was approved by the Commission in March follows:

	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
1. Limits for candidate-controlled committees			Mtg			Mtg			
2. Reporting of bundling								Mtg	
3. "Public benefit" contribution bans									
4. Slate mailer filings									
5. Enforcement regulations/policies									Mtg
6. Forfeiture/late fine penalties									
7. Expenditure lobbyists									
8. Additional gift of travel reporting									
9. Permit Consultant regulations									
10. Form 700 electronic filing		Mtg							

Notes:

- Shaded squares indicate staff work on the issue. Issues with no shaded squares will not be addressed by staff in 2015.
- "Mtg" indicates the Commission will consider the issue at a public meeting during that month.

Respectfully submitted,

John St. Croix
Executive Director

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[DRAFT]
Minutes of the Special Meeting of
The San Francisco Ethics Commission
May 27, 2015
Room 416, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

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I. Call to order and roll call.

Chairperson Renne called the meeting to order at 5:44 PM.

COMMISSION MEMBERS PRESENT: Paul Renne, Chairperson; Brett Andrews, Vice-Chairperson; Beverly Hayon, Commissioner; Ben Hur, Commissioner; Peter Keane; Commissioner. Chairperson Renne apologized for the delay.

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst; Catherine Argumedo, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA), Andrew Shen, DCA.

OTHERS PRESENT: Joe Kelly, Jr.; Larry Bush; David Pilpel; Robert van Ravenswaay; Charles Marsteller; Elena Schmidt; Paul Melbostad; Vivien; Anita Mayo, Pillsbury Winthrop Shaw Pittman; Armeen Komeili, Nielsen Merksamer; Joan Wood; Rebekah Krell, Deputy Director, Arts Commission; and other unidentified members of the public.

MATERIALS DISTRIBUTED:

- Staff Memorandum to Ethics Commission members regarding Hearing on Ethics Complaint 03-150127, Report and Recommendation on Ethics Complaint 03-150127 and attachments, Complainant's Response, Respondent's Response, Letter from the Office of the City Attorney to Ethics Commission regarding Ethics Complaint 03-150127, dated April 20, 2015, Letters from David Pilpel to Ethics Commission regarding Ethics Complaint 03-150127;
- Department of Human Resources Proposal to recruiters seeking assistance in selecting an Executive Director;
- Commissioner Keane's "Report on Recommendations for Both a Rewrite of The Language of Proposition J and For a Restoration of the Commission's Oversight of 'Expenditure Lobbying' in Ballot Measures for Upcoming Elections," dated May 13, 2015;
- Proposed Draft of Amendments to Lobbying Ordinance;
- Draft Minutes of the Ethics Commission's Regular Meeting of April 27, 2015;
- Executive Director's Report;
- Proposal from Alliance Resource Consulting LLC re: Executive Recruitment Search, dated May 20, 2015;
- E-mail from Jesse Mainardi to Commissioners, Executive Director, and DCA Shen re: Expenditure Lobbyist Feedback, dated May 27, 2015;
- Draft of Amendments to Lobbying Ordinance, provided on May 27, 2015.

[Larry Bush distributed a binder to each of the five Commissioners, but did not provide additional copies for the public.]

II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.

Joe Kelly Jr. stated that the agenda did not include an item regarding the forfeiture letter. Chairperson Renne stated that the complainant's lawyer asked for a continuance to the June 5 special meeting.

Larry Bush asked that the June 5 discussion include a discussion about whether the statute of limitations applies.

III. Discussion and possible action on a matter submitted under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance.

a. Ethics Complaint No. 03-150127, hearing regarding alleged violation of the Sunshine Ordinance.
Complainant: Paula Datesh
Respondent: Rebekah Krell, Arts Commission Deputy Director

Chairperson Renne stated that the matter had been before the Commission during its April 2015 meeting.

Commissioner Keane stated that he had previously asked to be recused from this matter and stated that he would leave the dais. Prior to leaving, he noted for the record that, since the April meeting, he had received eight telephone messages from Ms. Datesh. He stated that he did not listen to them and deleted them. Commissioner Keane left the dais.

Chairperson Renne stated that Commissioner Hur had asked to continue the matter from the April meeting to review an e-mail. He also noted that the complainant was not present during the meeting and had agreed that the Commission hear the matter in her absence. Commissioner Hur stated that he reviewed the e-mail and a memorandum provided by the City Attorney's Office. He stated that the Commission should find that there was not a violation of 67.21(b); that sections 1040 and 1041 of the Evidence Code provide privileges; and that the e-mail was properly withheld the e-mail.

Motion 15-05-27-01 (Hur/Andrews): Moved, seconded, and passed (4-0, Keane recused) that the Commission find no violation of Sunshine Ordinance section 67.21(b).

Public Comment:
David Pilpel stated that none of the conditions in Chapter 3, section 1.A of the Commission's regulations were satisfied. He stated that the complainant did not satisfy the conditions to bring the matter before the Commission. He agreed with the motion and asked the Commission to make the City Attorney's memorandum available to the public.

Commissioner Keane returned to the dais.

IV. Discussion and possible action on Executive Director recruitment process.

Chairperson Renne stated that there was only one response from the six vendors approached and it came from Alliance Resource Consulting. He stated that one other vendor may consider a response if the Commission were to grant an extension. Deputy Executive Director Mainardi excused himself from this item and sat with the public. Executive Director St. Croix stated that approximately $18,300 had been identified for this recruitment expense and that an additional $1,600 would be encumbered from funds for the next fiscal year.

The Commissioners discussed the amount of funds to be used for the recruitment and agreed that $20,000-25,000 would be an acceptable range, but that the Commission may be open to increasing the amount as well. Commissioner Andrews stated that there would be room for negotiation depending on the scope of work. The Commissioners agreed to follow the suggestions of the Committee, made up of Chairperson Renne and Vice-Chairperson Andrews. The Commissioners also discussed the projected timeline for the recruitment.

Motion 15-05-27-02 (Hur): Moved and not seconded that the Commission retain a recruitment firm for the Executive Director position, presuming that the Chairperson and Vice-Chairperson find one that is suitable.

Public Comment:
Larry Bush stated that it could be difficult for the Commission to recruit for a Director due to the stated lower salary. He stated that the proposal is inadequate and disagreed with the proposal's description.

Robert Van Ravenswaay stated that the actual fees for the proposal are higher than those discussed. He stated that the Commission may be required to pay for additional expenses, such as travel expenses for candidates.

David Pilpel stated that the proposal had only been available to the public for an hour. He agreed that the total cost in the proposal may be $28,500. He stated that he had issues with the proposal and the approach of the recruitment, but that he did not object to the Commission using a firm in concept.

DCA Shen stated that Alliance had previously performed searches for three City department heads: Civil Service Commission, Department of the Environment, and Department of Building Inspection.

Charles Marsteller stated that the low salary amount was not reasonable. He asked why the salary could not be raised.

Elena Schmidt stated that, during a pervious IP meeting, it was stated that the public would have another opportunity to provide input regarding the Director's job responsibilities. She noted that the proposal allowed only one week's time for this input.

Chairperson Renne stated that he agreed that one week was an unrealistic timetable. He noted that salary had been mentioned in Alliance's proposal, but that he did not see it mentioned in the DHR request that went to the vendors. He stated that his view was that salary would be negotiated based on budget and level of expertise of the individual being interviewed. He stated that he did not see a limitation on the document that DHR sent to the vendors. He also stated that criticism of the proposal is premature. He stated that drafting a job description is a next step, after choosing the recruitment firm. He stated that a draft would be discussed with the public.

DCA Shen stated that a new RFP process, seeking proposals from beyond just the six previously-approved vendors, would take approximately four months. He stated that would need to happen before a job profile was drafted and before it would go out to possible candidates.

Commissioner Keane stated that he was pleased to hear that the job description is not yet complete. Commissioner Hayon suggested contacting similar organizations and finding a firm with experience in this area. She stated that the amount of time it may take to vet a recruitment firm that has not worked with the City is important and that the Commission has competent staff. She stated that things that should be taken care of will be taken care of and suggested that the Commission do the recruitment search well.

The Commissioners discussed whether it would extend the deadline for the five other vendors who did not previously respond to DHR's request. The Commissioners preferred the idea of having more than one proposal. The Commissioners discussed extending the deadline for the other vendors and also possibly reaching out to other similar agencies to find if recruitment firms were used in searches for the Executive Director of those bodies. DCA Shen stated that, in terms of reaching out beyond the six firms who have already been approached, any firm would be able to apply and would be subject to the normal competitive process. He stated that there may be restrictions on telling certain firms to apply or suggesting that certain firms be offered the opportunity. The Commissioners then discussed the deadline for the extension.

Motion 15-05-27-03 (Hur/Keane): Moved, seconded, and passed (5-0) that the Commission extend the deadline for submission for proposals from recruiting firms from the original six firms and, concurrently, that the Chairperson and Vice-Chairperson reach out and have some informative informal interviews with other like bodies.

Public Comment:
Larry Bush suggested that the Commission request supplemental funds from the Mayor's Office.

Charles Marsteller stated that the Commission should provide a one-week extension. He stated that Bob Stern will be at the June 5 special meeting.

David Pilpel stated that he agreed with a one-week delay so that the Commission could take further action at its June 5 special meeting.

Motion 15-05-27-04 (Hur/Keane): Moved, seconded, and passed (5-0) that the Commission delegate the decision of choosing the search firm to the Chairperson and Vice-Chairperson.

Public Comment:
None.

V. Discussion and possible action on Commissioner Keane's "Report on Recommendations for Both a Rewrite of The Language of Proposition J and For a Restoration of the Commission's Oversight of 'Expenditure Lobbying' in Ballot Measure for Upcoming Elections."

Commissioner Keane introduced the item. He stated that a ballot measure related to Proposition J will be postponed for the 2016 election. He thanked those who assisted in drafting the language for "expenditure lobbying" and stated that Deputy Director Mainardi added input. He requested that the

Commission authorize him to continue the dialogue with staff over the next month in order to finalize the language for the measure. He stated that he would present the final language during the Commission's regular June meeting and then the Commission could decide whether it would like to propose the measure for the 2015 ballot. Chairperson Renne asked whether the Commission could proceed without having Interested Persons meetings or additional hearings. DCA Shen stated that there was no specific legal requirement to have a hearing, although it would be in keeping with the Commission's past practices for any legislation it has proposed.

Commissioner Hur thanked Commissioner Keane for his work and agreed that the Commission take action. He stated that he believed the specific language was too broad and that various definitions would also be too difficult to enforce. He also had questions about the registration requirements. He also voiced concerns about the process, as staff is typically responsible for drafting legislation and they provide analysis regarding why changes need to be made. He stated that if it goes to the ballot, more work needs to be done and that the Commission needs to hear from staff and the regulated community. He also stated that if the legislation went through the Board of Supervisor, it would be more easily amended. He also stated that he would not be able to attend the regular June meeting.

Chairperson Renne asked Commissioner Keane for an example of an "expenditure lobbyist." Commissioner Keane stated the following: "You want Supervisor X to favor a particular position for you. You then go ahead and have a conference in the Four Seasons Hotel in Nice, France that you sponsor and Supervisor X is someone and there are a number of individuals who will speak on various types of topics. Supervisor X is someone who is invited. You have had no contact with Supervisor X, but Supervisor X just by coincidence is spending 2 weeks in the south of France in beautiful weather, enjoying the amenities of the Four Seasons. Then, he comes back. You have had no dealings with Supervisor X. You haven't asked him to do anything, but you are doing it clearly to influence his legislation. That is an expenditure lobbyist."

Motion 15-05-27-05 (Keane/Hayon): Moved, seconded, and passed (4-1; Hur dissented) that Commissioner Keane continue drafting the measure with staff and other interested members of the public and return with a proposed ballot initiative for the Commission to vote on it.

Public Comment:
Larry Bush provided an example of "expenditure lobbying" from a recent DCCC meeting.

Paul Melbostad stated that the public depends on the Commission to take leadership and the Commission should put the measure on the ballot, rather than presenting it to the Board of Supervisors first. He stated that all Board members have supporters that would do things for them and do not want to have to report them.

Vivien stated that she strongly supported moving forward with the ballot measure. She stated that powerful forces are behind what seem to be grassroots action. She stated that any resistance to full disclosure is suspect in itself.

Charles Marsteller stated that so-called grassroots efforts are sponsored by lobbying organizations.

Anita Mayo, Pillsbury Winthrop Shaw Pittman, stated that various other jurisdictions require disclosure of similar activity. She noted that the proposed definition of "expenditure lobbyist" is not the typical definition and will create confusion. She stated that the registration requirements deviate from the other jurisdictions. She stated that this rule was not needed, but that if the Commission

chooses to proceed, urged the Commission to adopt similar rules to those of Sacramento, San Jose, or the State of California.

Armeen Komeili, Nielsen Merksemer, was concerned with the ballot measure process, as it would prevent the Commission from adopting any clarifying amendments. His also stated that one organization could be required to file multiple reports with the same information. He requested that the Commission proceed through the legislative process and provide additional opportunities for review.

Robert van Ravenswaay suggested that the Commission include language in the proposed ballot measure that would permit amendments to be made when there is a super-majority of both the Commission and Board, similar to what is in CFRO and the Conflict of Interest Code.

David Pilpel stated that there are issues with the definition and how to track expenditures and how to regulate and enforce. He agreed with the suggestion of including the super-majority language for clarifying amendments.

Joan Wood asked the Commission to permit Commissioner Keane to continue his work.

DCA Shen stated that the City Attorney's Office is happy to work with Commissioner Keane and staff on final language. He also reminded the Commission that approval would require four votes at the regular June meeting, meaning a unanimous vote since Commissioner Hur will be absent.

Commissioner Keane stated that DCA Shen has already been included in the process of the drafting. He also disagreed with sending the legislation to the Board first. He stated that the Board has its own constituency, own payoffs, and that they are not a group that could look at this neutrally. He stated that it would be like asking the fox to guard the chicken coop. He stated that the Board would grind it up like hamburger or put it in the wastebasket or just let it sit there. He stated that the Commission has an obligation to put it on the ballot.

Commissioner Hur asked about the super-majority language mentioned earlier. DCA Shen stated that the clause allows for later legislative fixes, so long as those changes carry out or fulfill the purposes of the legislation. He stated that he had no opposition to Commissioner Keane's proposal, but that he would not be present at the June 22 meeting.

Deputy Director Mainardi asked whether staff should prepare a memorandum on this item for the June 22 meeting. Chairperson Renne stated that staff would provide input on the draft. Commissioner Keane stated that he had been appointed by the Commission to report and make recommendations. Commissioner Hur stated that it was an unusual process and stated that staff needs a big role and heavy involvement. Chairperson Renne stated that a draft would be submitted to the City Attorney's Office to draft a final document in order to present it to the Commission at its June 22 meeting. He asked the City Attorney's Office to focus on the enforcement provisions in that statute. Deputy Director Mainardi referenced the previously-approved staff work calendar.

VI. Discussion and possible action regarding complaints received or initiated by the Ethics Commission concerning: (1) California Government Code section 84104 and San Francisco Campaign & Government Conduct Code section 1.109(a) (failure to maintain required committee records), California Government Code section 84300(b) (making cash expenditures), and San Francisco Campaign and

Governmental Conduct Code sections 1.114(a) (exceeding contribution limits); and (2) San Francisco Campaign and Governmental Conduct Code section 2.110(c) (failure to disclose lobbying contacts). Closed Session.

Public Comment:
None.

Motion 15-05-27-06 (Hur/Andrews): Moved, seconded, and passed (5-0) that the Commission move into closed session.

Public Comment:
None.

Deputy Executive Director Mainardi stated that he would recuse himself for one of the two matters.

The Commission moved into closed session at 7:43 PM. All members of the public and Deputy Executive Director Mainardi left the hearing room. The Commission members, Executive Director St. Croix, DCA White, and Ms. Argumedo remained in the hearing room during closed session. The Commission returned into open session at 7:54 PM.

Motion 15-05-27-07 (Andrews/Hayon): Moved, seconded, and passed (5-0) that the Commission not disclose its closed session deliberations re: anticipated litigation.

Public Comment:
None.

VII. Discussion and possible action on Commission's April 27, 2015 draft meeting minutes.

Public Comment:
David Pilpel suggested two changes: one on page 6, regarding the motion to recuse Commissioner Keane and the other on page 10, regarding adding a clarifying sentence about this special meeting.

Motion 15-05-27-08 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission approve the April 27, 2015 minutes, as amended.

VIII. Discussion of Executive Director's Report.

Executive Director St. Croix noted that the Commission had held five IP meetings. He also stated that staff has received 21 records requests and has been working hard in its responses. Deputy Director Mainardi stated that the report also included a project calendar, per Commissioner Hur's request. He stated that he anticipates that the regulation regarding the Form 700s will be on the June 22 meeting. He also stated that he anticipated further meetings on candidate-controlled committees.

Public Comment:
David Pilpel noted two items in the second paragraph under Item 7, regarding percentage of filers or those who have completed training. He asked staff to confirm that the figures were accurate. He approved of the project calendar and asked for it to be updated.

IX. Items for future meetings.

Commissioner Hur asked that the packet for the proposed legislation for expenditure lobbyists include definitions of expenditure lobbyists that are used by other jurisdictions. Chairperson Renne asked that the recruitment process for the Director be included on the agenda for the June 5 special meeting.

Public Comment:
None.

X. Adjournment.

Motion 15-05-27-09 (Andrews/Hayon): Moved, seconded and passed (5-0) that the Ethics Commission adjourn.

Public Comment:
None.

The Ethics Commission adjourned the meeting at 8:03 PM.

DRAFT

Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

SAN FRANCISCO ETHICS COMMISSION
NOTICE OF SPECIAL MEETING
June 5, 2015, 1:00 P.M.
and AGENDA
Room 400 City Hall
1 Dr. Carlton B. Goodlett Place, San Francisco

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NOTICE: This is not the Commission's regular meeting time or date.

I. **Call to order and roll call.**

II. **Presentation regarding the potential need for, and implications of, imposing limitations on candidate-controlled ballot measure committees and/or legal defense funds. (Discussion and possible action.) Presenters include:**

Robert M. Stern, Former Director of the Center for Governmental Studies, Principal co-author of the Political Reform Act; and

Corey Cook, Ph.D., Associate Professor, Department of Politics, University of San Francisco; Director, Leo T. McCarthy Center for Public Service and the Common Good.

III. **Discussion and possible action regarding further changes to the San Francisco Campaign Finance Reform Ordinance amendments which were approved by the Commission at its meetings on January 26, 2015 and February 23, 2015. At its May 28, 2015 meeting, the Rules Committee of the Board of Supervisors approved the Commission's proposal, and Supervisor Avalos requested that the Commission approve an additional amendment. (Attachment: Staff Memoranda including proposed amendment.)**

IV. **Discussion and possible action on Executive Director recruitment process. (Attachment: Recruitment Proposal from Alliance Resource Consulting.)**

V. **Discussion and possible action regarding staff's proposed revocation of a forfeiture letter sent to Supervisor Mark Farrell on December 9, 2014. (Attachments: Forfeiture Letter to Supervisor Mark Farrell Dated 12/9/14; Draft Letter to Supervisor Mark Farrell; Letters from Charles Bell.)**

VI. **Discussion and possible action regarding a complaint received or initiated by the Ethics Commission concerning San Francisco Campaign and Governmental Conduct Code section 1.114 (contribution limits). Possible Closed Session.**

a. **Public comment on all matters pertaining to Agenda Item VI, including whether to meet in closed session.**

b. **Vote on whether to assert attorney-client privilege and meet in closed session under Charter section C3.699-13, Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss anticipated litigation as plaintiff. (Action.)**

c. **Conference with Legal Counsel: Anticipated litigation as plaintiff. (Discussion and possible action.)**

Number of possible cases: 1

d. **If closed session is held, reconvene in open session.**

e. **Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding anticipated litigation as plaintiff. (Discussion and possible action.)**

Motion: The Ethics Commission moves (not) to disclose its closed session deliberations re: anticipated litigation.

VII. **Adjournment.**

There will be an opportunity for public comment on each agenda item.

Materials contained in the Commission packets for meetings are available for inspection and copying during regular office hours at the Ethics Commission, 25 Van Ness Avenue, Suite 220, at least 72 hours prior to meetings. Any materials distributed to members of the Ethics Commission within 72 hours of the meeting or after the agenda packet has been delivered to the members are available for public inspection at the Ethics Commission, 25 Van Ness Avenue, Suite 220, San Francisco, during normal office hours.
Cell phones, pagers and similar sound-producing electronic devices: The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. The Chair may order the removal from the meeting room of any person responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices.

Disability Access: The Ethics Commission meeting will be held in Room 400, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA. The Commission meeting room is accessible to persons using wheelchairs and other assistive mobility devices. Ramps are available at the Grove, Van Ness and McAllister entrances. The closest accessible BART station is the Civic Center Station at United Nations Plaza and Market Street. Accessible MUNI lines serving this location are: #42 Downtown Loop, and #71 Haight/Noriega and the F Line to Market and Van Ness and the Metro Stations at Van Ness and Market and at Civic Center. For information about MUNI accessible services call (415) 923-6142. There is accessible curbside parking adjacent to City Hall on Grove Street and Van Ness Avenue and in the vicinity of the Veterans Building at 401 Van Ness Avenue adjacent to Davies Hall and the War Memorial Complex.

To request assistive listening devices, real time captioning, sign language interpreters, readers, large print agendas or other accommodations, please contact the Ethics Commission at (415) 252-3100 or ethics.commission@sfgov.org at least 72 hours in advance before the meeting, except for Monday meetings, for which the deadline is 4:00 p.m. the previous Friday. Late requests will be honored, if possible.

Language Access: Per the Language Access Ordinance (Chapter 91 of the San Francisco Administrative Code), Chinese, Spanish and or Filipino (Tagalog) interpreters will be available upon requests. Meeting

Minutes may be translated, if requested, after they have been adopted by the Commission. Assistance in additional languages may be honored whenever possible. To request assistance with these services please contact at (415) 252-3100 or ethics.commission@sfgov.org at least 48 hours in advance of the hearing. Late requests will be honored if possible.

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FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE SUNSHINE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4689; phone: (415) 554-7724; fax: (415) 554-7854; email: SOTF@SFGOV.ORG. Copies of the Sunshine Ordinance can be obtained from the Clerk of the Sunshine Task Force, at the San Francisco Public Library, and on the City's website at http://www.sfgov.org

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Executive Recruitment Search

EXECUTIVE DIRECTOR, ETHICS COMMISSION

City and County of San Francisco, CA

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ALLIANCE
RESOURCE CONSULTING LLC

May 20, 2015

VIA ELECTRONIC MAIL

Mr. Brent Lewis
Deputy Director, Department of Human Resources
City and County of San Francisco
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Dear Mr. Lewis:

Alliance Resource Consulting is pleased to submit this proposal to assist the City and County of San Francisco in its efforts to recruit and screen candidates for the Executive Director, Ethics Commission position. Enclosed is our proposal which outlines how we would partner with your organization to recruit the best individuals. It describes the steps we will take to accomplish the recruitment within your desired timeframe. If you desire some modification of the proposed work program, we would be pleased to discuss that with you.

Alliance Resource Consulting's corporate motto is "The Power of Partnership." We take this seriously and have built our reputation on providing services of the highest quality. Alliance Resource Consulting was formed in 2004 when our executive search consultants acquired the highly regarded executive search practice of one of the largest public sector consulting/government services companies in the United States. With the innovative use of technology and a commitment to forming enduring partnerships with our clients, Alliance Resource Consulting is committed to setting a new standard for the industry.

We do not have any potential conflicts of interest from past recruitments or relationships. We will be happy to answer any additional questions you may have. We look forward with great interest to working with you on this very important assignment.

Sincerely,

Sherrill Uyeda

Sherrill Uyeda
Founding Partner

SOUTHERN CALIFORNIA OFFICE
400 Oceangate, Suite 510
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ALLIANCE
RESOURCE CONSULTING LLC

EXECUTIVE DIRECTOR, ETHICS COMMISSION

City and County of San Francisco, CA

1 – OUR UNDERSTANDING

It is our understanding that the City and County of San Francisco wishes to engage an executive search firm to assist in the Executive Director, Ethics Commission recruitment.

The Executive Director, Ethics Commission should be experienced in the drafting and administrating of laws related to campaign finance regulation, lobbyist and campaign consultant activity, conflict of interest and government ethics. He/She will establish and maintain working relationships with Commission members, elected and appointed officials, staff, other departments and organizations, media and the general public.

Alliance Resource Consulting prides itself on its commitment to customer service to both the client and the candidates.

2 – FIRM QUALIFICATIONS

2.1 Project Team

In 2004, Alliance Resource Consulting acquired the national executive recruiting practice of MAXIMUS. We are committed to providing our clients with the highest caliber of service in the industry. Our team of dedicated professionals utilizes custom-built state-of-the-art technology in conducting a search.

We are based out of Long Beach, California and are the only firm in California to provide unlimited on-site visits to in-state clients. We also have offices in Palo Alto, California; Tallahassee, Florida and Seattle, Washington.

Our current staffing is:

Sherrill Uyeda – Founding Partner
Cindy Krebs - Regional Director, Pacific Northwest
David McDonald – Regional Director, East Coast
Syldy Tom – Manager
Richard Kaplan – Research Consultant
Geoff Gambling – Research Consultant
Daniela Pallafacchina – Research Consultant
Linda Kann – Special Projects and Graphics Manager

Sherrill Uyeda and Cindy Krebs will work on this recruitment. Biographies can be found in Appendix A and references can be found in Appendix B.

2.2 Our Experience

We believe we are exceptionally well qualified to assist you. We have extensive nationwide experience recruiting executives for government agencies and special districts and have helped to place excellent diverse people in both small and large organizations.

Recently, we recruited the Human Resources Services Director - Public Utilities Commission for your organization.

We are currently recruiting the Director of Public Affairs for the Municipal Water District of Orange County. In the last few years, we have also completed the following recruitments which had similar duties and responsibilities:

- Director of Records and Elections for the City of Santa Monica, CA
- Executive Director, Water Policy for the Irvine Ranch Water District, CA
- Senior Mediator for Kearns and West (San Francisco, CA)
- Director of Government Affairs for the North Texas Tollway Authority (Dallas, TX)

We previously completed the recruitments for the Chief Legal Counsel for the Los Angeles County Employees Retirement Association (CA), County Counsel for Los Angeles County (CA), County Counsel for Contra Costa County (CA), General Counsel for Metrolink (CA) and General Counsel for Alameda-Contra Costa Transit District (CA).

Our ability to carry out the work required by your agency is enhanced by our past experience in providing similar services to others, and we expect to continue such work in the future. It should be noted that all of the recruitments listed above were completed on time and within budget.

We will preserve the confidential nature of any information received from you or developed during our work on this recruitment in accordance with our established professional standards.

We assure you that we will devote our best efforts to carrying out the work required. The results obtained, our recommendations and any written material we provide will be our best judgment based on the information available to us.

2.3 Advantages of Our Firm

Relative to your present search requirements, we believe the principal advantages in using Alliance Resource Consulting which differentiate us from other firms are:

- Our track record of success in placing superior senior level executives in particularly sensitive and highly responsible/accountable positions.
- Our specialization in public sector executive search on a nationwide basis.
- Our extensive experience recruiting executives for government agencies and special districts.
- Our PROACTIVE recruitment of candidates who may not be seeking new employment and would not normally respond to routine advertising and highly qualified candidates who might be overlooked by traditional recruiting approaches.
- Our ability to develop and meet a recruitment timeline to fit your needs.
- The fact that we assign two professionals to each recruitment to ensure we are always available to quickly respond to your most pressing requirements.
- The quality of our work and the fact that most of our clients have retained our services on more than one engagement.
- Our proven ability to identify and recommend qualified female and minority candidates.
- The transparency of our recruitment process. We will provide you a client login to our recruiting system so you can see how things are progressing at any time. We will also prepare weekly updates for you throughout the peak of the recruiting process.

- Our reputation among clients and candidates for timely communication and documentation (e.g., acknowledgement of receipt of candidate application, client status reports, candidate interviews, client meetings and candidate feedback).
- The thoroughness of our documented reference, internet and background checks. We request very specific references from candidates and supplement our reports with information gathered from available information sources such as LexisNexis and public records. Our ability to enhance the recruitment process through stakeholder outreach, the use of online surveys, and targeted research.
- The fact that all of our graphics work is done in-house, saving our clients time and money.
- Our promise to conduct the recruitment at the cost proposed. We have never charged a client more than our proposed amount.

3 – RECRUITMENT METHODOLOGY & APPROACH

Alliance Resource Consulting believes that we are an extension of your organization. As such, we work within your expectations and guidelines. Our objective is to find the best qualified candidates. While notices in professional journals may be helpful, many of the best candidates must be sought out and their interest encouraged. Our general familiarity with the organization, knowledge of the field and our relationships with professional organizations make us well qualified to assist you.

Our clients have found that we are able to:

- Develop the appropriate specifications for a position.
- Encourage the interest of top-level people who would be reluctant to respond to advertisements.
- Preserve the confidentiality of inquiries, consistent with State public disclosure and open meeting laws.
- Save a considerable amount of time for client staff in developing and responding to candidates.
- Protect the confidentiality of the information discussed with or received from the client.
- Build consensus among those involved in the hiring process.
- Independently and objectively assess the qualifications and suitability of candidates for the particular position for which we are recruiting.
- Adhere to client's budget and schedule expectations.

If you desire to retain us for a full and thorough recruitment process, we will do the following for your recruitment:

3.1 Strategy Development

We will interview members of the Search Committee and other client contacts to obtain a detailed understanding of the position, key goals and challenges, and organizational culture. We will also discuss expectations regarding desirable training, experience and personal characteristics of candidates. In addition, should you request it, we will conduct/facilitate community outreach meetings and focus group discussions.

We also have experience creating and managing community surveys, should the organization want input from its constituents. We will also gather/review relevant information about the organization, such as budgets, organization and/or department goals, organization charts, etc.

Once our findings have been summarized, we will submit a Recruitment Profile with the desired qualifications and characteristics to you for approval. The Recruitment Profile that will be sent to potential candidates will include information about the organization, the job and the criteria established by you.

3.2 Active Recruitment

Once you have approved the Recruitment Profile, we will actively seek out individuals who meet your expectations. To achieve the best response, we will take a three-prong approach to attracting candidates:

1. **Direct Contact** – We will mail invitations and recruitment profiles to targeted individuals in comparable organizations at the appropriate level. These invitations will be followed up with direct phone calls to potential candidates to gauge interest.

2. **Internal "Job Alert"** – Over the past ten years, we have developed an active database of over 19,000 candidates who are active in various public sector positions. We will send a new "job alert" to all our registered users in the Alliance Resource Consulting candidate application program. Prospective candidates will be contacted via e-mail with a link to the PDF version of the Recruitment Profile.

3. **Advertisements** – We will place job advertisements in the appropriate professional journals and on-line sites.

As a matter of corporate policy, we do not discriminate against any applicant for employment on the basis of race, religion, creed, age, color, marital status, sex, sexual preference, disabilities, medical condition, veteran status or national origin. A substantial percentage of the placements made by our firm have been minority or female candidates.

Frequent communication with our clients is a hallmark of our firm. While consultants will provide regular updates on the progress of your search, you will also be able to access up-to-date 'real time' information regarding your search from our secure website.

3.3 Candidate Evaluation

We will review, acknowledge and evaluate all resumes received. Candidate evaluation will begin with an analysis based upon criteria contained in the Recruitment Profile, information contained in the resumes submitted to us, and our knowledge of the people and organizations for which they work.

The next phase in candidate evaluation will focus on gaining additional information from the qualified group of candidates through written supplemental information questionnaires and other resources. Telephone interviews will be conducted with the most promising candidates to gain a better understanding of their backgrounds, qualifications and interest in the position.

3.4 Progress Report Meeting

After the resume deadline, we will submit to you a progress report of the leading candidates. This report will include summary resumes, supplemental information, and the original resumes of those candidates we believe to be best qualified for the position. Supplemental information on a candidate typically includes: the size of the organization for which the person works, reporting relationships, budget responsibility, the number of people supervised, related experience and reasons for interest in the position. Any other specific information will be dictated by the criteria set forth in the Recruitment Profile.

The purpose of our progress report is two-fold. It allows you an opportunity to review the candidates and choose those who you would like to invite to be interviewed for the position. It also allows us to receive feedback on the caliber of the candidates recruited. In addition, at this point we will have conducted preliminary background checks on each of the presented candidates. Of course, we are flexible and may consider other individuals as final candidates who are subsequently identified and were not included in the progress report.

3.5 Preliminary Interviews

We will interview (either in person or via video-conference) those candidates identified by you to be the leading candidates. We will conduct a preliminary interview with questions that focus on the selection criteria. Additionally, we will verify degrees and certifications and continue to gather information about the candidate's professional backgrounds.

3.6 Client Interviews & Interview Books

We will assist you in scheduling final candidates for interview with your organization, and will send the candidates packets of information which we obtain from you should you request it (e.g., information about the organization and the geographic area, budgets, etc.).

We will prepare final interview books for the selection panel. These books will include interviewing/selection tips, suggested interview questions, and rating forms for your use. Candidates will not be ranked, for we believe it will then be a matter of chemistry between you and the candidates.

We will also be on-site for the interview day(s). We will brief the interview panel at the start of the interviews and will facilitate the process throughout the day. After the last candidate interview, we will assist you in "debriefing" the interview panel members.

As part of our process in evaluating candidates, we make telephone reference checks. In conducting these references, it is our practice to speak directly with individuals who are, or have been, in a position to evaluate the candidate's performance on the job. To gain a well-rounded impression of the candidates, we speak with current and prior supervisors, peers and subordinates. These references and our evaluations provide you with a frank, objective appraisal of the candidates. Once we finalize references on the top one or two candidates and conduct credit/criminal/civil litigation/motor vehicle record checks through an outside service, we will provide you with a detailed candidate evaluation report.

3.7 Special Assistance

Our efforts do not conclude with presentation of the final report. We are committed to you until a successful placement is made. Services that are routinely provided include:

- Arranging the schedule of interviews and the associated logistics for final candidates.
- Advising on starting salary, fringe benefits, relocation trends and employment packages.
- Acting as a liaison between client and candidate in discussing offers and counter offers.
- Conducting a final round of reference checking with current employers (if not previously done for reasons of confidentiality).
- Notifying those candidates who were not recommended for interview of the decision. Following up with the client and the selected candidate once he/she has joined the organization to ensure a smooth transition.

4 – OUR CLIENT'S ROLE

The client has a very important role in the recruitment process. While we may identify and recommend qualified candidates, it is the client who must make the decision about which candidate to hire.

In order to insure that the best candidates are available from which to choose, our clients should be willing to do the following:

- Clearly inform us about matters relevant to the search that you wish to keep confidential (e.g., salary, personnel issues, and other privileged information).

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

PAUL A. RENNE
CHAIRPERSON

BRETT ANDREWS
VICE-CHAIRPERSON

BEVERLY HAYON
COMMISSIONER

BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

June 5, 2015

Supervisor Mark Farrell
c/o James Sutton
150 Post Street, Suite 405
San Francisco, CA 94108

Dear Supervisor Farrell:

On December 8, 2014 the Ethics Commission issued a letter to you requesting a forfeiture in the amount of $181,403.04 in relation to a stipulation adopted by the Fair Political Practices Commission on November 20,2014. The stipulation found that your campaign consultant, Christoper Lee, coordinated with the "Common Sense Voters, Vote for Mark Farrell" committee.

Your legal representation has argued to the Ethics Commission that this forfeiture request is invalid both because the statute of limitations has expired and because you have not been found to have been complicit in these coordination activities.

Arguments have been presented to the Ethics Commission that the statute of limitations has been tolled in this case due to the "doctrine of fraudulent concealment." The courts, in some instances, have granted estoppel to the statute of limitations in various cases where a defendant deliberately concealed evidence, in particular for the purposes of running the clock on the limitations statute. At present, it does not seem likely that a court would apply that doctrine in this case.

In reviewing this matter, the Ethics Commission is troubled by the circumstances of the coordination activities. However, the commission also realizes that you are not named as a respondent in the stipulation reached with the Fair Political Practices Commission based on the investigation they conducted and that the Commission does not have evidence before it that you committed an act of fraud.

Therefore, the Commission has decided to waive the demand of forfeiture presented to you in the December 8, 2014 letter.

Sincerely,

John St. Croix
Executive Director

25 Van Ness Avenue, Suite 220 • San Francisco, CA 94102-6053• Phone (415) 252-3100• Fax (415) 252-3112
E-Mail Address: ethics.commission@sfgov.org Web site: http://www.sfethics.org

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR
CHAIRPERSON

PAUL A. RENNE
VICE-CHAIRPERSON

BRETT ANDREWS
COMMISSIONER

BEVERLY HAYON
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Via U.S. Mail

December 9, 2014

Supervisor Mark Farrell
c/o James Sutton
150 Post Street, Suite 405
San Francisco, CA 94108

RE: Forfeitures due from 2010 election

Dear Supervisor Farrell:

I am writing to you regarding forfeitures that have not yet been paid relating to the 2010 election.

On November 20, 2014, the Fair Political Practices Commission ("FPPC") approved a Stipulation between its staff and Common Sense Voters, Vote for Mark Farrell for Supervisor 2010 ("CSV") and Christopher Lee. In 2009, you created the Mark Farrell for District 2 Supervisor 2010 committee and retained Chris Lee as your committee's campaign consultant. The FPPC found that Mr. Lee coordinated with CSV, its principal officer, and its campaign consultant regarding the setup, fundraising, and initial campaign planning of CSV. The FPPC found that Mr. Lee's interactions caused CSV to become your candidate-controlled committee.

As CSV was a candidate-controlled committee, it was subject to the $500 contribution limits in section 1.114 of the San Francisco Campaign and Governmental Conduct Code ("SF C&GCC"). In addition, CSV's expenditures were not considered independent and have been treated as contributions to you from the persons making the expenditures to the candidate on whose behalf, or for whose benefit the expenditures are made, in accordance with section 1.115 of SF C&GCC. Pursuant to section 1.114(f) of SF C&GCC, each committee that receives a contribution which exceeds the limits "shall pay promptly the amount received…in excess of the amount permitted by this Section to the City and County of San Francisco and deliver the payment to the Ethics Commission for deposit in the General Fund of the City and County."

According to CSV's filings, CSV made $43,399.18 in expenditures in your support and $148,003.86 in expenditures against other candidates for Supervisor of District 2, for a total of $191,403.04. As stated above, these expenditures are not considered independent and have been treated as contributions to you. Of the $191,403.04 spent on your behalf and for your benefit during the 2010 election, $190,903.04 exceeded the $500 contribution limit in SF C&GCC section 1.114. Therefore, pursuant to section

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1.114(f), you are required to forfeit $190,903.04 to the City and County of San Francisco and deliver the payment to the Ethics Commission for deposit in the General Fund of the City and County. The Ethics Commission may provide a waiver or reduction of the forfeiture.

If you have any questions or wish to discuss this letter, please feel free to contact me at 415-252-3100.

Sincerely,

John St. Croix
Executive Director

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Attorneys and Counselors at Law

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May 28, 2015

BY ELECTRONIC MAIL & HAND DELIVERY

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Re: ***June 5, 2015 Special Meeting – Mark Farrell, Common Sense Voters, SF 2010***

Dear Chairman Renne & Commissioners:

At your April 24, 2015 meeting, the Commission voted to allow the Executive Director to determine whether a letter could better describe the reasons for waiving the $190,903.40 forfeiture imposed on Mark Farrell and the Common Sense Voters, SF 2010, which Mark Farrell and his agent admitted was a controlled committee, not the independent expenditure committee identified in all of its reports to the date it terminated. The draft letter Mr. St. Croix prepared and submitted to the Commission, which stated without explanation that the grounds were "statute of limitations concerns," was rejected on a 4-1 vote by the Commissioners.

In the interim, although Mr. St. Croix told me and my clients in a face to face meeting on May 6, 2015 that the Ethics Commission was totally unaware of the FPPC's actions until it received the proposed FPPC Stipulation on November 10, 2014, this statement appears to be untrue. We have learned that the Ethics Commission staff, either deliberately or in a grossly negligent manner, may have chosen not to pursue the Farrell matter sometime between late July 2014 and late August 2014. In late July 2014, the FPPC staff advised the Ethics Commission

staff that it was preparing an enforcement action without specifying the detail. On August 20, 2014, the FPPC submitted a copy of the proposed settlement agreement to the Ethics Commission staff. This document asserted that Mark Farrell through his agent controlled Common Sense Voters, SF 2010. The FPPC staff told the Ethics Commission investigator that they were prepared to enter into a joint stipulation with the Ethics Commission and the proposed respondents. Five days later, on August 25, 2014, the FPPC submitted the proposed settlement to James R. Sutton, Esq., on behalf of Chris Lee and Mark Farrell. Evidently, the Ethics Commission indicated to the FPPC staff during that five day period that it would not enter into a joint stipulation.

We may never know all the reasons the Ethics Commission staff "punted" in late 2014 on this matter, or discover what influences, including those of Mr. Farrell, his attorneys or other influential individuals, may have been brought to bear on them to take the very unusual action of walking away from a case the FPPC presented them on a silver platter. However, the Ethics Commission is not powerless to act to enforce its December 9, 2014 forfeiture demand now!

We surmise that you may be advised by your counsel, the City Attorney, by Mr. Sutton, or both, that this decision not to act would subject the forfeiture action to challenge on the grounds of "equitable estoppel," the principle that would bar government action against a party in the face of government wrongdoing, misjudgment or error that would manifestly be unjust to that party. Implicit in that conclusion is the idea that even if our position on "fraudulent concealment" extending the four year statute of limitations is correct, the government's action or inaction trumps the statute of limitations tolling issue. This is flatly wrong!

While "equitable estoppel" may bar a governmental agency from acting against an allegedly *innocent* wrongdoer, here the wrongdoer – who engaged in the fraudulent concealment of his wrongdoing – *is not innocent*, and thus is not permitted to benefit from such wrongdoing by invoking this doctrine of equity.

As the California Supreme Court has said in several important cases, generally, four elements must be present for the doctrine of equitable estoppel to apply. "First, the party to be estopped (in this case, the Ethics Commission) must have been aware of the [true] facts." *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal. 4th 976, 994-95; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488. Here, by virtue of Farrell's and his agent Lee's fraudulent concealment, the Ethics Commission's knowledge of the facts did not occur until late August 2014. "Second, that party must either intend that its act or omission be acted upon, or must so

act that the party asserting estoppel has a right to believe it was intended." (*Id.*) In this case, that matter had never been brought by the Ethics Commission staff to the Commissioners, so the staff's intent not to act certainly is in doubt and Farrell's reliance on its non-action also in doubt. "Third, the party asserting estoppel must be unaware of the true facts." (*Id.*) Here, Farrell and Lee indisputably were aware of the true facts, and are were not innocent parties at all. "Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment." (*Id.*, quoting *Lentz v. McMahon* (1989) 49 Cal.3d 393, 398–399.)

However, even when these elements are present, the Supreme Court has been very clear that equitable estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the public. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 398–399; accord, e.g., *Mansell, supra,* 3 Cal.3d at pp. 488-489.) Importantly, the rule of fraudulent concealment as discussed in our previous submissions, is just such a "strong rule of policy adopted for the benefit of the public." The tolling, or extension of the statute of limitations here, is appropriate, and Farrell and his agents are powerless to prevent it by invoking "equitable estoppel," where they were clearly wrongdoers.

As we have stated in writing and orally at Commission hearings over the past six months, this unparalleled cheating is a stain upon the San Francisco electoral process, and the Commission cannot wash its hands of the matter where the grounds to forbear are so meritless. Failure to act not only validates the illegal action but diminishes the stature of the Commission as the government agency charged with protecting the San Francisco electorate and the integrity of the elections process.

We hope this information is informative and useful to you in your further deliberations.

Very truly yours,

Charles H. Bell, Jr.

CHB/cfd

1362.01

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May 7, 2015

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Re: ***Agenda Item # III, April 24, 2014 Meeting – Mark Farrell, Common Sense Voters, SF 2010***

Dear Chairman Renne & Commissioners:

At your April 24, 2015 meeting, the Commission voted to allow the Executive Director to determine whether a letter could better describe the reasons for waiving the $190,903.40 forfeiture imposed on Mark Farrell and the Common Sense Voters, SF 2010, which Mark Farrell and his agent admitted was a controlled committee, not the independent expenditure committee identified in all of its reports to the date it terminated. The draft letter Mr. St. Croix prepared and submitted to the Commission, which stated without explanation that the grounds were "statute of limitations concerns," was rejected on a 4-1 vote by the Commissioners.

I have attached two documents, the first entitled "Statute of Limitations --- Key Questions and Answers" that addresses why the statute of limitations, if it were applicable, was tolled (extended). This attachment focuses on the actions of Chris Lee, Farrell's agent, after it became known that his actions had resulted in coordination that fundamentally tainted the activity. Under well-settled principles of agency law, of course, Farrell is responsible for the acts

of his agent. It also evaluates why under any set of circumstances, the December 9, 2014 forfeiture was timely.

The second, entitled "Farrell and Common Sense Voters Timeline – Timeline of Undisputed Evidence and Investigative Activity of FPPC," sets forth in detail what happened, including the activity that led to the FPPC stipulation in which Farrell and his agent admitted that CSV was his controlled committee. This includes the timeline of the investigation, including major gaps in time of this investigation. As you know, the FPPC investigation led to charges against Farrell and CSV in late August 2014, almost four years after the activity and forty five months after the complaint was filed.

It is important to note that during the entire period of time, neither the FPPC nor the SFEC discussed, or made any further inquiries of, the complainant or her attorney, and hence, we had absolutely no knowledge of the course of the investigation or the settlement issues --- knowledge which Farrell, Michaela Alioto-Pier, and all their agents, and their attorneys, had by virtue of the investigation and interviews.

We hope this information is informative and useful to you in your further deliberations.

Very truly yours,

Charles H. Bell, Jr.

CHB/cfd

1362.01

FARRELL/COMMON SENSE VOTERS TIMELINE

Timeline of Undisputed Evidence and Investigative Activities of FPPC

DATES	ACTIVITY
~Late August 2010	Michaela Alioto-Pier's appeal fails – ending her reelection option.
September 9, 2010	Alioto-Pier, Farrell, Farrell staff and Rich Schlackman meet – shortly afterward CSV is formed, although it is not registered until 10/2/10. Alioto-Pier agrees to directly assist Farrell campaign (see below) and to spearhead IE fundraising effort for Farrell. [From FPPC Stipulation, Exh. 1, p.1.]
~September 10, 2010	Jack Helfand, Farrell associate and fundraiser, leaves Farrell committee to act as fundraiser/principal of CSV. [From FPPC Stipulation, Exh. 1, p.1.]
September 13, 2010	Chris Lee – Farrell's consultant – hires Schlackman as CSV consultant; provides fundraising information to CSV and draft material for IE communication. [From FPPC Stipulation, Exh. 1, p.1. Lee FPPC interview, p. 2.]
~September 13, 2010	Rich Schlackman comes on board for CSV. Chris Lee admits on 10/20/2012 to FPPC that Schlackman was identified to do IE work to CSV principal Helfand. However, Schlackman is long-time consultant for Alioto-Pier, was present at September 9, 2010 meeting between Farrell and Alioto-Pier, and could be deemed to be part of the coordination by virtue of Lee's reference and close working relationship with Alioto-Pier whose admitted involvement made her an (uncharged) agent of Farrell in the CSV matter. [From FPPC Stipulation, Exh. 1, p.1. Alito- Pier interview. Lee interview, p. 2.]
Sept – Nov 2010	Alioto-Pier works to raise funds, endorse and appear in ads for Farrell while raising 89% of CSV's contributions. Admits in February 2013 to raising money from Coates and Wilsey for CSV. [From FPPC Stipulation, Exh. 1, p.1.]
October 2, 2010	CSV registers as independent committee supporting Farrell. Names Jack Helfand as principal officer and Stacy Owens as treasurer. Helfand is a Farrell business associate and former Farrell finance committee member, and Owens is also Farrell's main campaign committee treasurer.
October 6, 2010	Farrell meets for 2 hours with Dede Wilsey – to collect $500 check for his committee. After Wilsey gives him $500, 2 weeks later (10/18/10) she gives CSV $50,000. [Farrell FPPC interview.] Alioto –Pier admits raising money from Wilsey. [From FPPC Stipulation, Exh. 1, p.1.]
October 15, 2010	Farrell attends fundraiser at Tom Coates' home. [From Reilly Complaint and Farrell interview.]
October 16, 2010	Regular pre-election report period closes. CSV reports about $30,500 in activity on report.

October 18, 2010	3 days after Coates' fundraiser for Farrell and 2 days after close of regular campaign reporting period, Coates gives $100,000 to CSV. Coates gives another $41,000 to CSV on October 25, 2010. [From CSV campaign reports, on file with SF Ethics.] Note – it is common for last minute negative campaigns to raise pre-arranged late money after such regular reports because the special reports are much less visible. Over $170,000 of CSV's contributions were received during the last two weeks of the campaign.
October 23, 2010	CSV begins $190,000 IE campaign against Janet Reilly and files 24 hour reports. This activity is after the last regular pre-election report (period closing 10/16/10) on which CSV's activity would be reported. Next report, for year end 12/31/10, was filed on 1/31/11, and discloses full scope of CSV's contributions received and IEs made. 24-hour reports falsely disclose CSV as IE committee; fail to identify Farrell as controlling candidate; identify contributions which are in excess of limits to candidate controlled committee, but falsely fail to characterize them as candidate contributions.
November 2, 2010	Election Day
December 23, 2010	Janet Reilly files complaint with FPPC and SFEC alleging numerous violations of state and local law. Original complaint's theory is that Alioto-Pier, a candidate, illegally was involved with CSV (because under state law, candidates could not control or run an IE campaign for another candidate). Complaint suggests FPPC and SFEC investigate whether Farrell controlled CSV due to same treasurer, donors and Coates/Willsey connections. Alioto-Pier could have been charged as agent of Farrell in CSV activity due to her admitted involvement with both Farrell and CSV. [Alioto-Pier FPPC interview.]
January 11, 2011	FPPC sends Janet Reilly's attorney letter saying FPPC will investigate 12/23/10 complaint. FPPC had previously opened an investigation of CSV per a 11/2/10 complaint that did not raise IE or candidate-control issues. Neither Reilly nor her attorney hear anything further about the investigation, interviews, document production or receive any requests for information from the FPPC during the entire 4 year course of the matter. We receive a copy of the FPPC stipulation the day it is released to the public on November 10, 2014.
January 26, 2011	SFEC (St Croix) sends Janet Reilly's attorney letter saying FPPC would take lead to investigate, but SFEC would monitor for SF-specific violations. Neither Reilly nor her attorney hear anything further from SFEC until November 20, 2014 letter from St. Croix.
January 31, 2011	CSV files year end post-election report erroneously disclosing its activity as contributions to an IE committee, not a candidate-controlled committee and failing to disclose Farrell control or contributions in violation of SF C & GC 1.114.

Note: The Following Dates Noted by Asterisk Are Possible Statute of Limitations Fraudulent Concealment Tolling Start Dates

October 3, 2012* (Some 21 months elapse, during which FPPC conducts discovery. Investigator timeline shows no activity from 1/13/11 to 6/4/12 – some 17 ½ months.) FPPC interviews Chris Lee. Lee admits sending emails with Farrell donor names to IE principal, and admits sending emails about how to organize IE committee and at least one draft campaign communication to IE.

December 20, 2012* (25 months after CSV's activity) FPPC and SFEC first interview Farrell and disclose Lee involvement. Farrell is quoted as saying Lee acted as "rogue agent." Only FPPC summary is available. FPPC destroyed tapes of its Farrell interviews sometime around November 2014; we don't know if SFEC had or has such tapes. Farrell's attorney's comments during interview divert blame or knowledge from Farrell. Farrell disclaims knowledge or responsibility.

January 30, 2013 FPPC interviews Alioto-Pier by telephone from Italy. Alioto-Pier admits working with both Farrell's campaign committee and CSV and raising 89% of CSV's contributions.

February 25, 2013* FPPC and SFEC have second interview with Farrell by telephone. FPPC destroyed tapes of its Farrell interviews sometime around November 2014; we don't know if SFEC had or has such tapes.

August 25, 2014* (18 months later) FPPC sends CSV treasurer and Chris Lee (Farrell's agent) and Jim Sutton (Farrell's attorney) proposed Probable Cause settlement document outlining controlled committee allegations and proposed $17,500 fine. Reilly's counsel unaware of date SFEC advised of, or participated in any determination of FPPC proposal.

~November 9, 2014 (70 days later) Lee signs FPPC stipulation admitting controlled committee status and his role in matter. Stipulation was not signed by Farrell although he would have had to authorize Lee to admit and acknowledge CSV's Farrell controlled committee status. Fine reduced to $14,500 from $17,500.

November 10, 2014 (47 months after filing of Reilly complaint) FPPC first contacts Janet Reilly's counsel to advise that settlement stipulation will be on FPPC November 20, 2014 Meeting Agenda. This is same day as FPPC agenda is disseminated to the general public.

November 20, 2014 FPPC adopts Stipulation. FPPC chairman, in response to Reilly's attorney's letter of November 17, 2014, criticizes FPPC enforcement staff for not naming Farrell, but does not reject stipulation.

November 20, 2014 SFEC Executive Director St Croix sends letter to Reilly's counsel stating that SFEC is satisfied with FPPC's resolution of the matter, notwithstanding January 11, 2011 statement that SFEC would monitor for SF-related violations. St Croix states that SF Ethics Commissioners "are aware" of this position.

December 2, 2014	Reilly's counsel sends letter to SF Ethics Commissioners and St Croix, and separate letter to SF City Attorney Dennis Herrera, strongly objecting to this no further action position and pointing out illegal contributions and C & GC section 1.114(f) forfeiture penalty..
December 9, 2014	SFEC (St Croix) sends letter to Farrell outlining FPPC findings, stating that illegal contribution was made and demanding immediate payment to the City of $190,903.40 as forfeiture.
February 27, 2015	(70 days later) SFEC announces after closed session that it has directed letter to be sent to Farrell demanding response to December 9, 2014 forfeiture demand by March 15, 2015.
March 23, 2015	After receiving Farrell's response to February 27, 2015 ultimatum in which he requested full waiver of the forfeiture, and Reilly's communication, and after hearing argument by Sutton, and Bell, SFEC commissioners after full discussion fail to make or adopt any motion to grant waiver. Status quo: forfeiture demand in place. St Croix admits next step is to refer the matter to BDR.

STATUTE OF LIMITATIONS

Key Questions and Answers

1. What is fraudulent concealment that tolls (extends) the statute of limitations?

   "Fraudulent concealment" means the person knows of material facts related to his or her duties ... and knowingly conceals them in performing or omitting to perform those duties, for the purpose of defrauding the public of information to which it is entitled under this title. (Italics added.)

2. If Farrell's personal conduct was blameless in 2010 as he claims, what about Chris Lee's conduct before his late 2012 interview when Lee acknowledged his involvement?

   Lee's conduct concealed the CSV control by Farrell until late 2012 or early 2013. Although Farrell admitted to the FPPC and SFEC in late 2012 and early 2013 that he knew nothing of Lee's activities, yet, once he learned of them (which he clearly did at his interviews or even as late as August 25, 2014), he took no steps to amend campaign reports or admit that Lee on his behalf had done something wrong.

3. If the FPPC concluded that Mark Farrell did not know of his agents' acts that resulted in illegal coordination between CSV and Farrell's campaign, does this defeat "fraudulent concealment"?

   No. Lee's conduct was sufficient to invoke the tolling provision. Farrell's lack of knowledge of Lee's illegal coordination in 2010, if true, does not absolve him or CSV of the responsibility to have acted promptly when confronted with evidence of Lee's illegal coordination or of the FPPC's conclusion that this was illegal in August 2014.

   If Farrell was waiting for a determination from the FPPC or SFEC as to whether the conduct made CSV a Farrell-controlled committee, he would have become aware of that fact on August 25, 2014 when the FPPC sent his counsel a settlement proposal based on the controlled committee status.

4. What reasons might Farrell have had to conceal the fact of illegal coordination after late 2012 and early 2013?

   Farrell as a first term Supervisor was facing re-election in 2014, as well as the likelihood that SFEC could demand that he or CSV forfeit nearly $200,000. Bad publicity and a major financial fine could have jeopardized his reelection chances, and were likely reasons for Farrell to have avoided taking action either before August 25, 2014 or afterward.

5. If SFEC knew of Farrell's illegal coordination in late 2012 or early 2013, wouldn't it have had sufficient time to deal with these issues without potentially running afoul of the statute of limitations?

   Maybe, but that doesn't deprive SFEC of the opportunity to take the full four years (with the tolling or extension of the statute of limitations) to investigate and prosecute an action and/or apply the forfeiture remedy of C & GC 1.114(f).

Applications of Statute of Limitations

1. No Statute of Limitations for 1.114(f) Forfeiture Action: There is no specific statute of limitations for the forfeiture penalty for violation of C & GC 1.114(f).

2. Continuing Violations -- Statute of Limitations Inapplicable: Even if there were a 4 year statute of limitations on both forfeiture and administrative actions, the violations have not been cured and remain "unadmitted":

   A. Failure to amend CSV's statement of organization and Farrell's campaign committee's statement of organization to reflect CSV as a Farrell-controlled committee.
   B. Failure to identify CSV 2010 contributions (over $215,000) as over the limits. Campaign law requires the disclosure of illegal contribution activity. *FPPC v. Suitt* (1979) 90 Cal. App. 3d 126.

3. Less Favorable to Farrell:

   A. Statute Triggered: Filing of year end 2010 campaign report on January 31, 2011. False disclosure of committee as independent committee and false disclosure of expenditures as independent expenditures and false disclosure of contributions as unlimited, and not subject to C & GC 1.114 triggers 4 year statute of limitations.
   B. Without Fraudulent Concealment Tolling: deadline for administrative action on contribution violations and other disclosures would run in January 2015.
   A. With Fraudulent Concealment Tolling: Depends on Depends on When Material Concealed Facts were revealed:
      1. October 3, 2012 – when Lee admitted involvement with CSV. (add 22 months to tolling – that would extend statute to December 2017.)
      2. January 30, 2013 – following Lee interview when FPPC interviews Alioto-Pier and she admits material involvement with both Farrell and CSV. (add as 25 months to tolling – that would extend statute to March 2017.)
      3. August 25, 2014 – when FPPC develops proposed settlement. We don't know if this was shared with SFEC at that time. (add 3 to 45 months to tolling – that would extend statute to February 2015 - November 2018.)

4. ~November 9, 2014 – when Lee signs or FPPC makes public stipulation. (add 48 months to tolling – that would extend the statute to November 2018.)

4. More Favorable to Farrell:

B. Statute Triggered: Receipt of each over-limits contribution triggers 4 year statute of limitations.

C. Without Fraudulent Concealment Tolling: Deadline for administrative action for contribution violations would run on the illegal contributions in late October 2014 (before Lee and Committee sign stipulation admitting violation, but after service of August 25, 2014 FPPC settlement demand.)

D. With Fraudulent Concealment Tolling: Depends on When Material Concealed Facts were revealed:

1. October 3, 2012 – when Lee admitted involvement with CSV. (add 22 months to tolling – that would extend statute to September 2016.)
2. January 30, 2013 – following Lee interview when FPPC interviews Alioto-Pier and she admits material involvement with both Farrell and CSV. (add as 25 months to tolling – that would extend statute to December 2016.)
3. August 25, 2014 – when FPPC develops proposed settlement. We don't know if this was shared with SFEC at that time. (add 3 or 45 months to tolling – that would extend statute to February 2015 - August 2017.)
4. ~November 9, 2014 – when Lee signs or FPPC makes public stipulation. (add 48 months to tolling – that would extend the statute to November 2018.)

Farrell (center). Supervisor Michela Alioto-Pier also attended (far right).

[DRAFT]
Minutes of the Special Meeting of
The San Francisco Ethics Commission
June 5, 2015
Room 400, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

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I. Call to order and roll call.

Chairperson Renne called the meeting to order at 1:04 PM.

COMMISSION MEMBERS PRESENT: Paul Renne, Chairperson; Brett Andrews, Vice-Chairperson; Beverly Hayon, Commissioner; Ben Hur, Commissioner; Peter Keane; Commissioner. Chairperson Renne stated that Executive Director St. Croix was absent from the meeting.

STAFF PRESENT: Jesse Mainardi, Deputy Executive Director; Catherine Argumedo, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Andrew Shen, Deputy City Attorney (DCA).

OTHERS PRESENT: Robert Stern, former Director of the Center for Governmental Studies; Corey Cook, Ph.D., Associate Professor, Department of Politics, University of San Francisco; Charles Marsteller; Larry Bush; Anita Mayo, Pillsbury Winthrop Shaw Pittman; David Pilpel; Bob Planthold; Robert van Ravenswaay; Ken Miller; Vince Courtney; Jim Maxwell; and other unidentified members of the public.

MATERIALS DISTRIBUTED:

- Staff Memorandum re: Further Proposed Changes to C.F.R.O. Amendments, dated June 3, 2015, including proposed amendment;
- Chart provided by Corey Cook, PhD.;
- Spreadsheet provided by Larry Bush;
- Recruitment Proposal from Alliance Resource Consulting;
- Forfeiture letter to Supervisor Mark Farrell, dated December 9, 2014;
- Draft letter to Supervisor Mark Farrell;
- Letters from Charles Bell;
- E-mail from Michael Garcia, dated June 4, 2015;
- Letter from James Sutton re: Revocation of Forfeiture Letter Sent to Supervisor Mark Farrell, dated June 4, 2015.

II. Presentation regarding the potential need for, and implications of, imposing limitations on candidate-controlled ballot measure committees and/or legal defense funds. Presenters include: Robert M. Stern, Former Director of the Center for Governmental Studies, Principal co-author of the Political Reform Act; and Corey Cook, Ph.D., Associate Profession, Department of Politics, University of San Francisco; Director, Leo T. McCarthy Center for Public Service and the Common Good.

Deputy Director Jesse Mainardi introduced the item and introduced both speakers, Bob Stern and Corey Cook. He stated the following:

"Good afternoon, Commissioners. Jesse Mainardi, Deputy Director. You will recall that earlier this year, the Commission resolved to investigate whether to propose a ballot measure imposing limitations on committees controlled by City candidates and officeholders which are not directly related to their campaigns for office.

These types of committees include:

1. Candidate controlled ballot measure committees, which raise and spend funds in support of, or in opposition to, particular ballot measures;

2. Candidate controlled general purpose ballot measure committees, which raise and spend funds in support of, or in opposition to, various, generally unspecified measures, usually over a number election cycles; and

3. Legal defense funds, which allow a candidate to raise funds to pay for legal expenses associated with litigation resulting from his or her candidacy.

By way of background, there are generally no limits on how much these committees may raise from any particular donor, although certain City contractors may be prohibited from contributing. Also, unlike with City candidate campaigns, corporations may generally make contributions to these candidate-controlled committees.

This item today is a part of the Commission's due diligence and further exploration of this issue. We are very lucky to have two experts today who will tell us more about these types of committees, how they are used by candidates, and whether, as a policy matter, certain restrictions may be advisable.

Our first speaker today is Bob Stern. Bob has been called the "godfather of modern political reform in California." He was a principal co-author of Proposition 9, otherwise known as the Political Reform Act of 1974, which continues to form the basis of California's campaign disclosure, ethics and lobbying laws. He was also a principal drafter of the City of Los Angeles' Ethics and Public Campaign Financing laws.

Bob served as the first general counsel of the Fair Political Practices Commission and later was the President of the Center for Governmental Studies, based in Los Angeles.

Bob has been honored for his public service by a number of good government groups including the League of Women Voters of Los Angeles, Common Cause California, Pomona College, and the Council on Governmental Ethics Laws. Bob is a graduate of Pomona College and Stanford Law School.

Our next speaker will be Corey Cook. For the last six years, Corey has been an Associate Professor in the Department of Politics at the University of San Francisco, where he has also served as the Director of the Leo T. McCarthy Center for Public Service and the Common Good.

Corey teaches courses in American Politics specializing in political institutions, urban and state politics, and the dynamics of political representation. His early work concerned campaign finance reform and his current research focuses on election results and political geography in California."

Robert M. Stern

Mr. Stern stated his experience and research at the Center for Governmental Studies ("CGS") of the field, including working for the Fair Political Practices Commission for nine years. He stated that he had studied campaign finance, redistricting, and the initiative process and written a series of reports and recommendations to improve campaign finance laws. He stated that one report in 1990 studied 18 cities and counties and recommended major changes in the law. He stated he was now semi-retired and working as a consultant and speaker.

Mr. Stern stated that CGS came out with a report about 12 years ago that urged the FPPC to adopt a regulation requiring contribution limits on candidate-controlled ballot measure committees. He stated that the court later invalidated the adopted regulation by stating that the FPPC exceeded its authority in adopting the regulation, but did not address the constitutionality of the regulation.

Mr. Stern stated that the purpose of contribution limits was to reduce the appearance of corruption when candidates receive campaign money. He stated that there is no difference in a candidate raising money for his or her own campaign and money for his or her ballot measure committee. Mr. Stern stated that a donor does not care how a contribution is used; the donor only cares about the gratitude of the officeholder. He stated that the donor at the very least wants access to the official; at the most, the donor wants a decision by the officeholder. He estimated that 90% of campaign money comes from people who want something from government. He cited the example of labor unions negotiating contracts, developers seeking a permits or variances, businesses seeking tax breaks or contracts. He stated that all want the support, or at least the ear, of the official.

Mr. Stern stated that allowing unlimited contributions to candidate controlled ballot measure committees allows for the circumvention of contribution limits for other candidate-controlled committees. He stated that officeholders get involved with ballot measure committees for various reasons: e.g., promote an issue, enhance their standing, to raise more money from special interests. He stated that a contributor may not care about the ballot measure, but he or she cares about his or her relationship with the City official. He stated that, in some instances, the contributor may be from out of town and have no idea what the measure is about, but contributes because the official asks for it.

Mr. Stern recognized that limits on candidate controlled ballot measure committees may seem unfair because other ballot measure committees will have no limits per a Supreme Court ruling from the 1980s. He stated that it is also unfair that officials can raise money from people who merely want to influence the candidate or official, as opposed to support or oppose the measure.

Mr. Stern stated that he was less concerned with legal defense funds, as the FPPC has rules on how they can be used: you must have a pending case against you. He again stated that it is unfair that an officeholder has access to money that a member of the public does not have. He stated that special interests would be interested in supporting legal defense funds for officeholders. He stated that fundraising should be strictly limited and have the same limits as candidate committees.

Mr. Stern stated that the bottom line was that if the Commission wanted to support meaningful limits for candidates, the Commission adopt contribution limits on both candidate-controlled ballot measure committees and legal defense funds. He stated that any committee that the officeholder or candidate controls should have contribution limits. He stated that no other jurisdiction has adopted limits on candidate-controlled ballot measure committees, but he thinks they should.

The Commissioners asked Mr. Stern various questions about the proposed limits on these committees.

Chairperson Renne asked whether a candidate controlled committee has to be focused on a specific ballot measure, or whether it can be a general fund supporting many measures. Mr. Stern stated that limits should apply to either type. He confirmed that a committee is candidate controlled because the candidate can help direct how the funds are spent.

Commissioner Hur asked if Mr. Stern would be comfortable with different limits for legal defense funds, campaign committees, and ballot measure committees. Mr. Stern stated that he would prefer the same limit for all based on the prior determination of what was the right limit, but would certainly prefer different limits to no limits. Mr. Stern also stated that he did not think that limits on legal defense funds would not deter people from running for office. Mr. Stern "guessed" that candidates would no longer control ballot measure committees if limits were imposed.

In response to Commissioner Andrews' question, Mr. Stern stated that there should be contribution limits on any committee controlled by any candidate. Mr. Stern provided an example of a candidate-controlled ballot measure committee controlled by former Mayor Villaraigosa. He stated that the former Mayor had raised hundreds of thousands of dollars from the same people who would have contributed to his candidate committee. He also gave the example of Governor Schwarzenegger raising well above the limits for his ballot measure committees from special interests. He stated that, although not true in all cases, these contributors would not be giving to these ballot measure committees except for the fact that the officeholder was involved.

In response to a question from Commissioner Renne, Mr. Stern stated that, if an officeholder asked a donor to give money to a committee that s/he did not control, the candidate would not control the funds and may not get the benefit of the expenses paid by the committee which might help the candidate. Mr. Stern said there was a difference between controlled and non-controlled committees. Mr. Stern stated that it is not common that these types of committees are created and that mayors and governors have been creating them, and there will be more if there are no restrictions.

Public Comment:
Charles Marsteller stated that Mr. Stern was his political mentor. He stated that an analogy could be made between regulating these types of committee and the need to impose loan limits on candidates. He stated that, after winning an election, an officeholder would have more cachet to raise money and pay back their loans.

Larry Bush stated that he had provided the Commissioners with spreadsheets. He stated that these types of committees provide an advantage to candidates because they allow a candidate to maintain a political infrastructure. He also noted that the contributions to the Mayor's committee mostly exceeded limits. He supported Mr. Stern's suggestion to place contribution limits on these committees.

Anita Mayo, Pillsbury Winthrop Shaw Pittman, provided documents to the Commissioners. She stated that case law has held that these types of limits are unconstitutional. She stated that free speech and freedom of association would be diluted and cited the state appellate case which struck down the FPPC's regulation. She stated that this case suggested that the limit would be unconstitutional. She stated that limits on legal defense funds may impact the quality of legal representation.

Mr. Stern stated that there was a constitutional question and he could not predict what the Supreme Court would do, but stated there is a difference between controlled and non-controlled committees. He stated he thought the Court would uphold it. The Commission thanked Mr. Stern for his testimony.

Corey Cook, Ph.D.
Dr. Cook stated the following:

"Mr. Chairman and Commissioners,

Thank you for the opportunity to address the commission. It is an honor to appear before you with Bob Stern, whose work I have admired for some time.

I began studying campaign finance issues in California in 1994 working for the California Research Bureau writing reports to the state legislature on campaign finance. That research was undertaken during the "wild west" period before Proposition 34 when California had few campaign finance regulations – between the passage of Propositions 68 and 73 in 1988 (which ultimately never took effect) and before Proposition 25 (which was defeated) and 208 (which was ruled unconstitutional) and California's current regulatory regime established by Proposition 34. Additionally, I've done research on public finance systems in Maine and Arizona as a graduate student and studied political reform efforts in California and San Francisco since becoming a professor in political science at San Francisco State and the University of San Francisco. I'm going to try to offer a political science perspective.

Beginning with Buckley vs. Valeo, the court has put the prevention of "corruption and the appearance of corruption" at the center of any efforts to regulate campaign financing.

In recent years, the court has interpreted "corruption" according to a narrow focus on bribery and quid pro quos rather distortion of the public interest and the undue influence of campaign contributors. I would dispute that narrow definition of corruption but nevertheless, the regulatory regime's primary focus has been on distinguishing between direct and indirect speech and regulating contributions to candidates and elected officials rather than direct spending.

For instance, in *Citizen United*, the Supreme Court held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.

The logic of San Francisco's contribution limits, set at $500, is to deal directly with this concern about "corruption and the appearance of corruption" stemming from contributions to candidates and officeholders. In my view, allowing, in essence, for unlimited and unregulated funds to flow through candidates and officeholders to use in ballot campaigns is a clear

circumvention of these limits and a clear distortion or the purpose of campaign finance law. It is worth stating, though it is beyond the scope of this hearing, that in my view, behested payments directly solicited by officeholders also create such an appearance, but at least these have been made more transparent, which is not the case with candidate controlled ballot measure committees.

To be clear, I am not asserting that any of the candidates and officeholders in San Francisco or California who have created a candidate-controlled ballot measure committee has participated in a quid pro quo or engaged in corruption. But the appearance of corruption and the potential for corruption is present. And I would add, as importantly in my view, is the potential to increase the cynicism and disengagement of the public through these convoluted and non-transparent campaign funding mechanisms.

Candidate-controlled committees are now fairly widespread at the state level – In a 2009 report, the FPPC estimated that state and legislative candidates raised $150 million in candidate-controlled committees for ballot measures in the first 8 years since the passage of Proposition 34.

Governor Arnold Schwarzenegger had his "Citizens to Save California" which raised substantial sums, including one contribution over $1.5 million. His expenditures gained some public attention including a reported $523,000 on executive jet services. Now, FPPC regulations generally limit expenditures by state candidate-controlled ballot measure committees to purposes related to the qualification, passage, or defeat of ballot measures. Still, Schwarzenegger went to the ballot repeatedly, with some successes and some notable failures to advance his legislative agenda.

Governor Jerry Brown has taken this to new heights. He raised $17 million for his Propositions 1 and 2 in 2014 and $42 million on his Prop. 30 initiative in 2012. Again, the single largest contributor was $1.5 million.

As noted, in addition to concern about the appearance of corruption is that for voters, it is exceptionally difficult to track the various committees. For instance, one $1.5 million contribution from

Californians Working Together To Restore And Protect Public Schools, Universities And Public Safety

Went to Governor Brown's controlled committee:

Yes On Prop. 30 - To Protect Our Schools and Public Safety, A Broad Coalition Of Teachers, Business, Labor, Law Enforcement, And Governor

I have tried to sort some of this out at the local level and examined six candidate controlled committees (please see appendix below).

As the chart indicates, there is quite a bit of a range in the size and scope of the committees. Most were designed to contest a specific measure, but one is a more general committee. But in every case,

- The majority of donors gave more than the $500 limit
- The majority of donors also gave to the candidate's committee
- The donors could have made contributions directly to a ballot measure committees (and some of the contributors gave to both.
- And in most of these cases, the candidates then distributed the funds to other ballot committees.

Because contributors are able to give directly to ballot committees, it is clear that this is indirect rather than direct speech and ought to be subject to contribution limits.

And this practice raises legitimate public policy questions about the appearance of corruption and potential for quid pro quos, and ultimately the lack of transparency around these contributions.

There exists a substantial literature in political science on ballot propositions and this emerging phenomenon, really since the late 1980s of political actors – candidates and officeholders – turning to ballot measure campaigns to advance their own campaigns.

Ballot measures do influence vote choice in candidate races – have "spillover effects."

They set the agenda and prime voters.

Ballot measures have a priming effect – they raise the salience of issues that voters use in evaluating candidates. For example, gay marriage in 2004, Illegal immigration, affirmative action.

These issues become important in evaluating candidates – even in cases where the issues are completely unrelated to the race.

And even when candidates are not on the same ballot, candidates can advance policy while advancing one's political career by taking stands on issues and elevating their public profile. Seeing this around the country. And seeing this in San Francisco.

It is good policy to subject candidate-controlled ballot measure committees and/or legal defense funds to the City's limits for candidate contributions

Courts have expressed concerns about the free speech rights of donors. But in contributing to a candidate, they are not directly speaking and as such this could and should be regulated as indirect speech.

There is always the option of creating independent ballot committees that can accept unlimited contributions. But passing it through officeholders creates a clear appearance of corruption and has substantial potential for coordination with candidate activities, particularly in light of the lack of regulations mandating that the funds be limited to spending on qualification, passage, or defeat of ballot measures as at the state level.

And lastly, I'm not concerned that this would unfairly limit the ability of candidates to advocate for a City ballot measure. There exist plentiful opportunities for candidates and

officeholders to promote measures through their official duties and to contribute their own funds and regulated campaign funds. And as we have seen in San Francisco, candidates have demonstrated a capacity to raise substantial sums to contest competitive campaigns while staying within the contribution restrictions.

The Commissioners asked Dr. Cook various questions about the proposed limits on candidate-controlled committees.

Commissioner Hur asked what else could be done if the proposed limit were unconstitutional. Dr. Cook said that disclosure would be the answer, as well as to ensure that the funds could only be used for advocacy regarding ballot measures. He stated that it is very difficult to discern where the money goes from these committees. He stated that no other jurisdiction has dealt with this issue well and was generally pleased with how San Francisco manages disclosure. He stated that most jurisdictions have not prioritized making data available in a clear manner.

In response to Commissioner Hayon's question, he also suggested that the Commission not ban candidate-controlled ballot measure committees altogether. Dr. Cook stated that he believes that contribution limits in San Francisco are sufficiently high that candidates can run well-financed, effective campaigns, but are also sufficiently low so as to avoid the appearance of corruption.

In response to Commissioner Andrews' question, Dr. Cook referenced the information on the chart he provided and stated that the majority of past donations to these types of committees would be in violation of this limit, if the limit had been in place in San Francisco.

Public Comment:
Larry Bush stated that the Commission could create a disclosure form for these types of committees, so that a donor could indicate what interest s/he has in the city and alert the public that the donor had an interest before the candidate. He also referenced the Oak project which bans an officer from making decisions affecting donors.

Mr. Stern clarified that the Oaks Project rules provide that if an officeholder votes on a project, the officeholder cannot receive a contribution or accept a job from the applicant for the next five years. He stated that this is an anti-incumbent provision, but that it has worked well in Pasadena even though it does not really deal with ballot measure committees.

Charles Marsteller thanked the Commission for allowing public comment after each speaker. He supported tying the limit to inflation, but agreed with the $500 limit.

David Pilpel stated that two approaches that have been discussed are to limit contributions or to ban contributions from certain individuals under certain circumstances. He stated that a third approach could be to prohibit an officeholder from taking certain actions following a contribution from an individual that would benefit them for a certain period of time.

III. Discussion and possible action regarding further changes to the San Francisco Campaign Finance Reform Ordinance amendments which were approved by the Commission at its meetings on January 26, 2015 and February 23, 2015.

Deputy Director Mainardi introduced the item. He stated that the Board would consider the amendments approved by the Commission on Tuesday, June 9, but that the Rules Committee

meeting generated discussion on two issues. He stated that the first issue related to the 24-hour reporting requirement for electioneering communications. He stated that the Rules Committee asked the Commission to reconsider exempting the requirement for the committees to report vendor information in the 24-hour disclosure reports. Commissioner Hur asked about the amendment procedure and process before the Board. DCA Shen stated that whatever the Commission approved during this meeting would be before the Board when it meets on Tuesday. He stated that it was possible that the Board could send the whole matter back to the Commission with additional changes.

Motion 150605-01 (Hur/Hayon): Moved, seconded, and passed (3-2; Keane and Renne dissented) that the Commission approve the language previously sent to the Board, making it consistent with what the state requires.

Public Comment:
David Pilpel supported the motion. He questioned whether the Board would be able to consider the matter on Tuesday. DCA Shen stated that the draft ordinance has been available for a long time and the Board could consider it.

Bob Planthold stated that the motion should be defeated and the Commission should recommend the amendment.

Chairperson Renne stated that he did not realize that the Commission had removed this requirement and he was inclined to vote against any resolution that sends a message that information that was previously required would no longer be required in the 24-hour turnaround.

Deputy Director Mainardi stated that the second issue related to an exemption for communications sent by 501(c)(3) charity organizations. He stated that federal tax rules already preclude those organizations from influencing elections and that staff saw the rule as a trap for the unwary. Commissioner Andrews expressed support for this exemption.

Motion 150605-02 (Andrews/Hayon): Moved, seconded, and passed (5-0) that the Commission support this exemption within CFRO, thereby retaining the language contained in the proposed draft legislation.

Public Comment:
Larry Bush did not support the motion.

Robert van Ravenswaay stated that he did not understand parts of staff's memorandum.

David Pilpel supported the motion.

IV. Discussion and possible action on Executive Director recruitment process.

Deputy Director Mainardi recused himself from the next two agenda items.

Chairperson Renne stated that no other responses had been submitted. He stated that only Los Angeles County, four years ago, had used an outside recruiting firm to fill a vacant Executive Director position. He stated that he and Vice-Chairperson Andrews would soon meet with Alliance to discuss the proposal and decide whether that firm will adequately perform the job. He stated that any member of the public would be welcome to attend the meeting and provide input.

Public Comment:
David Pilpel encouraged the Commissioners to meet in City Hall, to avoid a 15-day notice requirement.

V. Discussion and possible action regarding staff's proposed revocation of a forfeiture letter sent to Supervisor Mark Farrell on December 9, 2014.

Chairperson Renne stated that the Commission must decide whether to take any action on the draft letter submitted by Executive Director St. Croix.

Commissioner Keane stated that the Commission has had an extended discussion on this matter once before and nothing has changed. He stated that the Supervisor was elected on the basis of an illegal $200,000 contribution and that forfeiture was an appropriate measure. He wondered why Supervisor Farrell never addressed the Commission directly. He stated that what he did is corrupt. Commissioner Hur stated that the process was not handled well.

Motion 150605-03 (Keane/Renne): Moved and seconded that the Commission overrule Executive Director St. Croix's request for waiver.

The Commissioners questioned both Mr. Bell and Mr. Sutton, regarding fraudulent concealment, the agency of Mr. Lee, the discovery rule, the statute of limitations, and Supervisor Farrell's knowledge of or involvement in the independent expenditure committee.

Public Comment:
Robert van Ravenswaay stated that staff was setting their own policy of when to seek forfeiture. He stated that money was used improperly and forfeiture is appropriate.

Larry Bush referenced an August 2014 e-mail from FPPC to Commission staff. He provided a copy of the e-mail to the Commissioners.

Ken Miller, resident of District 2, stated that he knew Supervisor Farrell's character and values. He stated that he is guided by the highest ethical standards.

Bob Planthold supported the withdrawal of the waiver letter.

David Pilpel wondered whether the independent expenditure committee was the entity found to have become a candidate-controlled committee and asked whether it would have to forfeit the amount requested as well.

Vince Courtney stated that he agreed with what a previous speaker stated about Supervisor Farrell. He stated that former Supervisor Alioto-Pier had been involved in the independent expenditure at the time and had more ability to fundraise from people in District 2 than Supervisor Farrell. He stated that former Supervisor Alioto-Pier had been raising money for Supervisor Farrell and against Ms. Reilly.

Jim Maxwell stated that he was a neighbor of Supervisor Farrell and had seen him grow up. He stated that he has worked with his office and he has done fabulous work for the city. He stated that Supervisor Farrell wants to make San Francisco a better place.

Charles Marsteller expressed disappointment that Supervisor Farrell was not present.

Commissioner Hur asked whether the Commission could seek advice from the City Attorney on this matter, on the legality of the statute. Chairperson Renne stated that the Commission could move into agenda item six in order to confer with the City Attorney. Commissioner Keane asked whether the Commission could seek advice in open session. DCA Shen requested that the Commission discuss the matter in closed session.

VI. Discussion and possible action regarding a complaint received or initiated by the Ethics Commission concerning San Francisco Campaign and Governmental Conduct Code section 1.114(a) (contribution limits). Closed Session.

Commissioner Keane asked whether the Commission was required to discuss the matter in closed session. DCA Shen stated that it was a requirement and that it was in the best interest of the city and the Commission to discuss the matter in closed session.

Motion 150605-04 (Hur/Andrews): Moved, seconded, and passed (3-2; Hayon and Keane dissented) that the Commission move into closed session.

Public Comment:
Bob Planthold agreed with Commissioner Keane. He asked the Commission to inform the public what issues would be discussed. Commissioner Hur stated that the topic was the statute of limitations.

Larry Bush stated that the City Attorney would say that a court will find that the statute has passed, but will represent the Commission.

Charles Marsteller stated that it would be a disaster to rescind this letter.

Chairperson Renne stated that the Commission would move into agenda item six and later return to agenda item five.

The Commission moved into closed session at 3:45 PM and took a 10-minute break. All members of the public left the hearing room. The Commission members, DCA Shen, and Ms. Argumedo remained in the hearing room during closed session. The Commission returned into open session at 4:18 PM.

Motion 150605-05 (Hur/Andrews): Moved, seconded, and passed (5-0) that the Commission not disclose its closed session deliberations re: anticipated litigation, except to state that no decision had been made in closed session.

Public Comment:
None.

The Commission then continued discussion and possible action on agenda item five.

CONTINUATION OF AGENDA ITEM V

Commissioner Keane restated the pending motion (Motion 150605-03).

Commissioner Hur stated that he did not think that the Commission was considering whether Supervisor Farrell committed fraud or wrongdoing. He stated that he did not want to impugn his integrity or character based on these allegations. He stated that there are reasonable legal and factual disputes related to the statute of limitations. Chairperson Renne added that he too was not making a finding that Supervisor Farrell did or did not violate various campaign finance laws named in the FPPC stipulation.

Motion 150605-03 (Keane/Renne): Passed (5-0) that the Commission overrule Executive Director St. Croix's request for waiver.

VII. Adjournment.

Public Comment:
None.

The Ethics Commission adjourned the meeting at 4:24 PM.

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Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

NOTICE OF CANCELLATION OF REGULAR MONTHLY MEETING

THE ETHICS COMMISSION HAS CANCELLED ITS REGULAR MEETING SCHEDULED FOR THE FOLLOWING DATE:

June 22, 2015 5:30 P.M.
Room 400 City Hall
1 Dr. Carlton B. Goodlett Place, San Francisco

06-09-15P04:29 RCVD

6/15 cancelled

PLEASE NOTE THAT THE COMMISSION WILL INSTEAD HOLD A SPECIAL MEETING ON THE FOLLOWING DATE:

June 29, 2015 5:30 P.M.
Room 400 City Hall
1 Dr. Carlton B. Goodlett Place, San Francisco

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The required notice and agenda for the special meeting will be sent separately.

Materials contained in the Commission packets for meetings are available for inspection and copying during regular office hours at the Ethics Commission, 25 Van Ness Avenue, Suite 220, at least 72 hours prior to meetings. Any materials distributed to members of the Ethics Commission within 72 hours of the meeting or after the agenda packet has been delivered to the members are available for public inspection at the Ethics Commission, 25 Van Ness Avenue, Suite 220, San Francisco, during normal office hours.
Cell phones, pagers and similar sound-producing electronic devices: The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. The Chair may order the removal from the meeting room of any person responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices.

Disability Access: The Ethics Commission meeting will be held in Room 400, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA. The Commission meeting room is accessible to persons using wheelchairs and other assistive mobility devices. Ramps are available at the Grove, Van Ness and McAllister entrances. The closest accessible BART station is the Civic Center Station at United Nations Plaza and Market Street. Accessible MUNI lines serving this location are: #42 Downtown Loop, and #71 Haight/Noriega and the F Line to Market and Van Ness and the Metro Stations at Van Ness and Market and at Civic Center. For information about MUNI accessible services call (415) 923-6142. There is accessible curbside parking adjacent to City Hall on Grove Street and Van Ness Avenue and in the vicinity of the Veterans Building at 401 Van Ness Avenue adjacent to Davies Hall and the War Memorial Complex.

To request assistive listening devices, real time captioning, sign language interpreters, readers, large print agendas or other accommodations, please contact the Ethics Commission at (415) 252-3100 or

ethics.commission@sfgov.org at least 72 hours in advance before the meeting, except for Monday meetings, for which the deadline is 4:00 p.m. the previous Friday. Late requests will be honored, if possible.

Language Access: Per the Language Access Ordinance (Chapter 91 of the San Francisco Administrative Code), Chinese, Spanish and or Filipino (Tagalog) interpreters will be available upon requests. Meeting Minutes may be translated, if requested, after they have been adopted by the Commission. Assistance in additional languages may be honored whenever possible. To request assistance with these services please contact at (415) 252-3100 or ethics.commission@sfgov.org at least 48 hours in advance of the hearing. Late requests will be honored if possible.

Chemical-Based Products: In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical-based products. Please help the City accommodate these individuals.

KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE (Chapter 67 of the San Francisco Administrative Code): Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils, and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE SUNSHINE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4689; phone: (415) 554-7724; fax: (415) 554-7854; email: SOTF@SFGOV.ORG. Copies of the Sunshine Ordinance can be obtained from the Clerk of the Sunshine Task Force, at the San Francisco Public Library, and on the City's website at http://www.sfgov.org

Lobbyist Registration and Reporting Requirements: Individuals who influence or attempt to influence local policy or administrative action may be required by the San Francisco Lobbyist Ordinance (San Francisco Campaign and Governmental Conduct Code sections 2.100 – 2.160) to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102; telephone (415) 252-3100, fax (415) 252-3112; and website: www.sfgov.org/ethics.

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San Francisco
Ethics Commission

25 Van Ness Avenue, Suite 220
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Phone 252-3100 Fax 252-3112

Notice of Discussion and Possible Action on Proposed Regulations at the June 29, 2015 Special Meeting of the Ethics Commission

At its special meeting on Monday, June 29, 2015, at 5:30 p.m. in Room 400, City Hall, the San Francisco Ethics Commission will discuss and possibly adopt draft regulations which would impose electronic filing requirements for employees who file Statements of Economic Interests (FPPC Form 700) pursuant to the City's conflict of interest code. A draft of the proposed regulations is available for review on the Commission web site and at the Commission office. Staff may make further changes to the draft regulations based on public input and will post and circulate the version of the regulations that will be considered by the Commission with the June 29, 2015 agenda.

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Draft Regulations For Electronic Filing of Form 700s for All City Employees
Last Updated 6/16/15

Regulation ~~3.1-103-1~~ 3.1-102-1.

Effective January 1, *2014 2016*, all ~~*persons listed in Section 3.1-103(a) and (b)*~~ *City officers and employees holding a position designated in Chapter Three of Article One* of the Campaign and Governmental Conduct Code shall file assuming office, annual and leaving office Form 700 Statements of Economic Interests ~~*with the Ethics Commission*~~ in an electronic format prescribed by the Ethics Commission.

Regulation ~~3.1-103-2~~ 3.1-102-2.

(a) All persons listed in Section 3.1-103(a) and (b) of the Campaign and Governmental Conduct Code shall provide to the Ethics Commission a working and unique email address, in addition to a mailing address and telephone number and any other information required by the Ethics Commission consistent with the purposes and provisions of the Conflict of Interest Code. The email address shall be a personal or business email address, which may be a City email address. All such persons shall inform the Ethics Commission within 15 calendar days whenever a change is made to the email address, mailing address, or telephone number provided. All such persons shall provide the*ir* email address*es mailing address, and telephone number* under this regulation within 15 calendar days of assuming office ~~*or by January 1, 2014, whichever is later*~~.

(b) No later than September 15, 2015, all City designated employees (as referenced in Section 3.1-103(d) of the Campaign and Governmental Conduct Code) shall provide to their respective filing officers an email address, in addition to a mailing address and telephone number and any other information required by the Ethics Commission consistent with the purposes and provisions of the Conflict of Interest Code. The filing officer shall then provide this information to the Ethics Commission by no later than September 25, 2015.

(c) After September 15, 2015, all City designated employees shall provide the information listed in subsection (b) to their filing officer within 15 calendar days of assuming office. The filing officer shall then provide this information to the Ethics Commission within 5 calendar days of receipt.

(d) After September 15, 2015, all City designated employees shall inform their respective filing officers within 15 calendar days whenever a change is made to their email address, mailing address, or telephone number previously provided to their department filing officers. The filing officer shall then provide this information to the Ethics Commission within 5 calendar days of receipt.

Regulation ~~3.1-103-3~~ 3.1-102-3.

(a) A person required to file a Form 700 Statements of Economic Interests in electronic format may make a written request to the Executive Director of the Ethics Commission to seek permission to file an original paper copy instead of filing in electronic format. The person must submit the request at least 15 calendar days prior to the deadline for filing the Form 700 Statement of Economic Interests, and the request must provide the compelling reasons why the request should be granted. The Executive Director may grant or deny the request in his or her discretion.

(b) For purposes of this regulation, compelling reasons include a demonstrated risk of verbal or physical harassment to the filer or a family member of the filer; a demonstrated risk of physical, psychological or financial harm to the filer or a family member of the filer (other than financial harm arising in connection with actual or potential litigation); or similarly serious reasons. Compelling reasons do not include a mere preference not to file electronically or to have a Form 700 posted online, an unjustified refusal to comply with the Commission's set-up procedures, or similar general objections to Commission's Form 700 filing requirements.

Regulation 3.1-102-4.

(a) The Ethics Commission shall post on its website all assuming office, annual and leaving office Form 700 Statements of Economic Interests filed electronically by City officers and employees holding a position designated in Chapter Three of Article One of the Campaign and Governmental Conduct Code after January 1, 2016.

(b) A person required to file a Form 700 Statement of Economic Interests in electronic format may make a written request to the Executive Director of the Ethics Commission that the Commission remove the Form 700 on its website, or not post a Form 700 filed on paper pursuant to Regulation 3.1-102-3. The request must provide the compelling reasons why the request should be granted. The Executive Director may grant or deny the request in his or her discretion.

(c) For all Form 700 Statements of Economic Interests filed on or after January 1, 2016, the Ethics Commission shall redact from Form 700 Statements of Economic Interests posted online all phone numbers, email addresses, names of sources of rental income for real property, and street address information other than for reported real property interests. Notwithstanding the foregoing, the Ethics Commission shall comply with any regulations enacted by the Fair Political Practices Commission concerning the redaction of information on a Form 700 Statements of Economic Interest for statements filed on or after such enactment.

(d) For purposes of this regulation, compelling reasons include a demonstrated risk of verbal or physical harassment to the filer or a family member of the filer; a demonstrated risk of physical, psychological or financial harm to the filer or a family member of the filer (other than financial harm arising in connection with actual or potential litigation); or similarly serious reasons. Compelling reasons do not include a mere preference not to file electronically or to

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have a Form 700 posted online, an unjustified refusal to comply with the Commission's set-up procedures, or similar general objections to Commission's Form 700 filing requirements.

Regulation 3.242-1

The Ethics Commission may impose the administrative penalties set forth in the Charter on any person who fails to file or fails to timely file an assuming office, annual and leaving office Form 700 Statement of Economic Interests in the electronic format prescribed by the Ethics Commission. In addition to those administrative penalties, the Ethics Commission may also issue warning letters.

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Ethics Commission

25 Van Ness Ave., Suite 220
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SAN FRANCISCO ETHICS COMMISSION
NOTICE OF SPECIAL MEETING
JUNE 29, 2015, 5:30 P.M.
and AGENDA

Room 400 City Hall
1 Dr. Carlton B. Goodlett Place, San Francisco

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I. **Call to order and roll call.**

II. **Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.**

III. **Discussion regarding draft regulations for electronic filing and website posting of Statements of Economic Interests (FPPC Form 700). (Attachments: Staff memorandum including draft regulations and attachments; email from Friends of Ethics; letter from Messing, Adams & Jasmine LLP.)**

IV. **Discussion and possible action on Commissioner Keane's proposal to place on the November 3, 2015 ballot a measure regulating expenditure lobbyists. (Attachments: Proposed measure; legislative digest; summary of interested persons meeting.)**

V. **Discussion and possible action regarding Commission responses to the 2014-2015 Civil Grand Jury report, "San Francisco's Whistleblower Protection Ordinance is in Need of Change." (Attachments: 2014-2015 Civil Grand Jury report; draft Commission responses to same.)**

VI. **Discussion and possible action on a matter submitted under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance. (Attachments: Memorandum to the Commission; Hearing Notice; Staff Report and Recommendation and attachments.)**

a) **Ethics Complaint No. 10-150331, hearing regarding alleged violation of the Sunshine Ordinance.**
Complainant: Dominic Maionchi
Respondent: Phil Ginsburg

VII. **Discussion and possible action on Executive Director recruitment process. (Attachment: Recruitment proposal from Alliance Resource Consulting.)**

VIII. **Discussion and possible action regarding complaints received or initiated by the Ethics Commission concerning: (1) San Francisco Campaign and Governmental**

Conduct Code sections 1.122(b)(1) (improper use of campaign funds); and (2) San Francisco Campaign and Governmental Conduct Code section 2.110(c) (failure to report lobbying contacts). Possible Closed Session.

a. Public comment on all matters pertaining to Agenda Item VIII, including whether to meet in closed session.

b. Vote on whether to assert attorney-client privilege and meet in closed session under Charter section C3.699-13, Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss anticipated litigation as plaintiff. (Action.)

c. Conference with Legal Counsel: Anticipated litigation as plaintiff. (Discussion and possible action.)

Number of possible cases: 2

d. If closed session is held, reconvene in open session.

e. Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding anticipated litigation as plaintiff. (Discussion and possible action.)

Motion: The Ethics Commission moves (not) to disclose its closed session deliberations re: anticipated litigation.

IX. Discussion and possible action on the Commission's May 27 and June 5, 2015 draft meeting minutes. (Attachments: May 27, 2015 draft minutes; June 5, 2015 draft minutes.)

X. Discussion of Executive Director's Report. An update of important Ethics Commission staff activities since the previous monthly meeting. The written report, which is available at the Commission office and on its website, covers the investigation and enforcement program, revenues, campaign finance disclosure program, revenues, public financing/campaign finance audit program, lobbyist program, campaign consultant program, and outreach and education. Any of these subjects may potentially be part of the Director's presentation or discussed by the Commission. (Attachment: Executive Director's Report.)

XI. Items for future meetings. Commissioners may propose items for future agendas and the Commission may determine the priority of these items. (Discussion.)

XII. Adjournment.

There will be an opportunity for public comment on each agenda item.

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after the agenda packet has been delivered to the members are available for public inspection at the Ethics Commission, 25 Van Ness Avenue, Suite 220, San Francisco, during normal office hours.
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ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

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JOHN ST. CROIX
CUTIVE DIRECTOR

Date: June 24, 2015

To: Members, Ethics Commission

From: John St. Croix, Executive Director
By: Jesse Mainardi, Deputy Executive Director

Re: Adoption of Proposed Regulations Implementing Electronic Filing of Statements of Economic Interests for All City Employees

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Proposed Commission Action and Staff Recommendation

Staff recommends that the Commission approve the adoption and amendment of the regulations discussed below, which impose electronic filing and website posting requirements for all City employees who file Statements of Economic Interests (FPPC Form 700) pursuant to the City's conflict of interest code.

Background and Reasons for Proposed Regulatory Action

Certain City officers and employees are required to disclose financial interests on a Statement of Economic Interests (Form 700) on an annual basis, as well as upon assuming or leaving office. Reportable financial interests include sources of income, real property, and ownership interests in business entities.

In 2014, the Commission implemented mandatory electronic filing of the Form 700 for elected officials, department heads, and members of boards and commissions. The Commission makes these electronically filed Form 700s available on its web site immediately upon filing. Some personal information is currently redacted from the online Form 700s,[1] although members of the public are also able to access unredacted reports at the public computer kiosk in the Commission's office and through Sunshine Ordinance requests. The response from filers and the public has been generally positive.

The proposed regulatory amendments represent a continuation of the Commission's efforts in this regard, and expand the mandatory electronic filing requirement to cover all City employees who file a Form 700. The amendments would

[1] The redacted information includes phone numbers, emails, names of sources of rental income, and street address information other than for economic interests that are real property interests.

also make all Form 700s filed by the additional City employees -- which we understand number approximately 3,200 -- available online.

Currently, the Form 700s completed by these employees are filed with those employees' departments. Typically, each department designates its own "filing officer" to collect these Form 700s, and the Form 700s are neither forwarded to the Ethics Commission nor posted online. A member of the public who wishes to view a Form 700 filed by a designated employee must either submit a public records request or otherwise make arrangements to view the form at the relevant department.

The overall purpose of this effort is to improve transparency. In this regard, it is consistent with developments at the state level. The budget subcommittees for the state Assembly and Senate recently approved additional funding for the Fair Political Practices Commission ("FPPC") for use in building its own electronic Form 700 filing system. The project currently before the Commission is estimated to cost approximately $40,000 per year. The Commission will have to seek additional budgetary funding beyond the next fiscal year.

Staff held one interested persons meeting on this issue (which is summarized in Attachment A), and solicited comments from the City's 60 or so filing officers. Staff has already been working with these filing officers to prepare them and their employees for the expansion. Staff also plans an extensive outreach project over the next year.

Also, the Department of Human Resources notified all City unions of the proposed changes and held a "meet and discuss" conference with staff and a representative from one City union, who requested the conference and expressed certain concerns regarding the proposal's implications for City employees' privacy interests. Those concerns are discussed below.

Regulatory Proposals

1. Regulation 3.1-102-1.

This amendment requires all City "designated employees" who file a Form 700 – specifically, City employees who are not elected officials, department heads, and members of boards and commissions – to file electronically. The City's conflict of interest code, which is found in Article I, Chapter 3 of the Campaign and Governmental Conduct Code, lists these designated employees. Persons identified as designated employees are often managers in City departments or others with decision-making responsibilities. Under the proposed amendment, all designated employees would for the first time have to file electronically.

Under this proposal, a designated employee's department head or the executive director of his or her agency will remain the employee's filing officer, and thus will be responsible for instructing agency employees on electronic filing procedures, monitoring whether all required reports have been filed, and following up with non-filers. (*See* Cal. Govt. Code section 81010.)

The proposed regulation does not impose electronic filing requirements on persons listed in the City's conflict of interest code who do not work for a City agency.[2] Instead, staff proposes that the Commission phase in these filers at a future date as the next step in the process of moving entirely to electronic filing.

Staff makes this proposal for three reasons. First, it will allow further outreach to the affected employees of non-City agencies.[3] Second, it will allow staff to further review any legal issues associated with imposing electronic filing requirements on designated employees of these non-City agencies.[4] Third, it will ease the transition somewhat for staff as there will be approximately 500 fewer filers who might need technical assistance during the first year of the proposed expansion of electronic filing requirements.

The proposed regulatory language follows:

> **Regulation ~~*3.1-103-1*~~ *3.1-102-1*.[5]**
>
> Effective January 1, ~~*2014*~~ *2016*, all persons ~~*listed in Section 3.1-103(a) and (b)*~~ *holding a position designated in Chapter Three of Article One* of the Campaign and Governmental Conduct Code, *other than designated employees who do not work for the City and County of San Francisco,* shall file assuming office, annual and leaving office Form 700 Statements of Economic Interests ~~*with the Ethics Commission*~~ in an electronic format prescribed by the Ethics Commission.

2. Regulation 3.1-102-2.

This amendment requires all new electronic filers to provide information necessary to set up an account for filing the Form 700. This information, which must be provided to the filing officer, includes an email address and contact information, which is already provided by current electronic filers. The filing officer must then provide that information to the Commission staff for help in setting up the required e-filing accounts. Any subsequent account changes will be handled by the filing officers.

The proposed regulatory language follows:

> **Regulation ~~*3.1-103-2*~~ *3.1-102-2*.**

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[2] These agencies include the Community College District, Health Authority, the Housing Authority, the Law Library, and the San Francisco Unified School District. Briefly, these agencies are included in the City's conflict of interest code because the Board of Supervisors is designated as their "code reviewing body" by virtue of the fact that they are located entirely within the City's geographic area. (See Cal. Govt. Code §§ 82011(b), 87303.)

[3] Staff spoke with representatives of the non-City agencies, some of whom were generally willing to defer to the City on this issue. However, staff understands that the affected employees (and their unions) were not consulted.

[4] Staff has discussed this issue with both the City Attorney's office and the FPPC, and has not identified any legal obstacle to imposing electronic filing requirements on designated employees of these non-City agencies, but staff would ideally like additional time to consider this issue.

[5] Staff proposes renumbering the current regulations to better reflect the appropriate statutory authority.

(a) All persons listed in Section 3.1-103(a) and (b) of the Campaign and Governmental Conduct Code shall provide to the Ethics Commission a working and unique email address, in addition to a mailing address and telephone number and any other information required by the Ethics Commission consistent with the purposes and provisions of the Conflict of Interest Code. The email address shall be a personal or business email address, which may be a City email address. All such persons shall inform the Ethics Commission within 15 calendar days whenever a change is made to the email address, mailing address, or telephone number provided. All such persons shall provide the*ir* email address~~es~~ *mailing address, and telephone number* under this regulation within 15 calendar days of assuming office ~~*or by January 1, 2014, whichever is later*~~.

(b) No later than September 15, 2015, all City designated employees shall provide to their respective filing officers an email address, a mailing address, a telephone number, and any other information required by the Ethics Commission consistent with the purposes and provisions of the Conflict of Interest Code. The filing officer shall then provide this information to the Ethics Commission by no later than September 25, 2015.

(c) After September 15, 2015, all City designated employees shall provide the information listed in subsection (b) to their filing officer within 15 calendar days of assuming office. The filing officer shall then provide this information to the Ethics Commission within 5 calendar days of receipt.

(d) After September 15, 2015, all City designated employees shall inform their respective filing officers within 15 calendar days whenever a change is made to their email address, mailing address, or telephone number previously provided to their department filing officers. The filing officer shall then provide this information to the Ethics Commission within 5 calendar days of receipt.

3. Regulation 3.1-102-3.

This amendment allows the new filers to request a waiver from the electronic filing requirement, just like the current electronic filers. (A scanned copy of a paper Form 700 will still be posted online for any person receiving a waiver.) Four such waivers have been requested to date. The Executive Director denied all four requests.

The proposed regulation defines the types of compelling circumstances that would justify a waiver, including a demonstrated disability impacting the ability to file electronically or an unavoidable lack of access to technology at or near the filing deadline. It also indicates that the Executive Director must report to the Commission regarding his or her decision to grant a waiver request.

The proposed regulatory language follows:

> **Regulation ~~*3.1-103-3*~~ *3.1-102-3*.**
>
> *(a)* A person required to file a Form 700 Statement~~s~~ of Economic Interests in electronic format may make a written request to the Executive Director of the Ethics Commission to seek permission to file an original paper copy instead of filing in electronic format. The person must submit the request at least 15 calendar days prior to the deadline for filing the Form 700 Statement of Economic Interests, and the request must provide the compelling reasons why the request should be granted. The Executive Director may grant or deny the request in his or her discretion, *but must report to the Commission regarding each decision to grant such a waiver request*.
>
> *(b) For purposes of this regulation, compelling reasons include a demonstrated mental or physical disability or condition that prevents the filer from filing electronically; an unavoidable lack of online access at or near the filing deadline; or similarly serious reasons. Compelling reasons do not include a mere preference not to file electronically; an existing lack of online access at the filer's home or office; an unjustified refusal to comply with the Commission's set-up procedures; or similarly general objections to Commission's Form 700 filing requirements.*

4. Regulation 3.1-102-4.

The Commission currently posts electronically-filed Form 700s on its website. This regulation would codify that practice as well as require posting of paper copies filed pursuant to a Commission waiver. However, certain persons have expressed concern that the financial and address information of lower level City employees, such as the address of a spouse's workplace, will be so readily available online.

Among others, the union representative attending the "meet and discuss" conference facilitated by the Department of Human Resources expressed this concern. That representative distinguished these lower level employees from elected officials, board members and department heads who might reasonably expect the wide public dissemination of their (and their spouse's) financial information.

In this regard, staff understands that only twenty-nine (29) of the fifty-three (53) jurisdictions that use Netfile for Form 700 filing post some or all of the forms online. (As discussed below, certain information is redacted from those forms.) Of those that do post them online, eight (8) only post filings for higher-level (e.g., elected) officials. In sum, only twenty-one (21) of the fifty-three (53) jurisdictions using Netfile currently choose to make all of the filed Form 700s available online.

If the Commission finds these privacy concerns compelling, it has a few options. First, it might decide not to require Form 700s filed by City employees to be posted on its website at all. Second, as set forth in proposed subsection (b), it could allow a filer to request that the Ethics Commission not post his or her filing to the website in the first instance, or take it down after the fact, due to compelling reasons (e.g., harassment of the filer or a family member, etc.). Under the proposed language, the Executive Director may grant or deny any such request but must report to the Commission any decision to grant a request.

Also, as set forth in proposed subsection (c), the Commission could require the automatic redaction of certain information, including signatures, phone numbers, emails, names of sources of rental income from properties, and street address information other than for economic interests that are real property interests. This is the current practice and is consistent with the policy that Netfile applies statewide.

By way of comparison, the FPPC has enacted two regulations providing for the redaction of information on the *paper* copies of Form 700s *filed with the FPPC*, which the agency posts on its website. The first regulation requires the redaction of the signature, address, and phone number of the filer. The second regulation allows for the redaction of certain personal information if the filer "has a reasonable privacy concern related to an individual's address, or a family member's name or other personally identifiable information."[6] (2 Cal. Code of Regs. §§ 18313.5 & 18313.6, attached.)[7] The Commission may also want to consider the standard set forth in the second regulation if it prefers one that is broader than the one proposed by staff.

The proposed regulatory language follows:

> ***Regulation 3.1-102-4.***
>
> *(a) The Ethics Commission shall post on its website all assuming office, annual and leaving office Form 700 Statements of Economic Interests filed electronically after January 1, 2016. The Commission shall also post on its website all Form 700 Statements of Economic Interests filed on paper pursuant to Regulation 3.1-102-3.*

[6] Per the FPPC regulation, "personally identifiable information" includes: (1) the address of the individual; (2) the name of the family member; (3) the address of an entity at which the family member is employed; and (4) the name of any entity if the name of the entity would reveal the name of the family member or the address at which the family member lives or is employed.

[7] State law also provides that the FPPC may adopt regulations to require a local agency to redact information on a Form 700 prior to posting it online. (Cal. Govt. Code § 87500.2(e).) The proposed language requires compliance with any future FPPC regulation.

(b) A person required to file a Form 700 Statement of Economic Interests may request that the Commission not post the Form 700 on its website or that the Commission remove a Form 700 from its website. The request must be in writing, sent to the Executive Director, and provide the compelling reasons why the request should be granted. The Executive Director may grant or deny the request in his or her discretion, but must report to the Commission regarding each decision to grant such a request.

(c) For all Form 700 Statements of Economic Interests filed on or after January 1, 2016, the Ethics Commission shall redact from Form 700 Statements of Economic Interests posted online all signatures, phone numbers, email addresses, names of sources of rental income for real property, and street address information other than for reported real property interests. Notwithstanding the foregoing, the Ethics Commission shall comply with any regulations enacted by the Fair Political Practices Commission for local agencies concerning the redaction of information on a Form 700 Statements of Economic Interest for statements filed on or after such enactment.

(d) For purposes of this regulation, compelling reasons include a demonstrated risk of verbal or physical harassment to the filer or a family member of the filer; a demonstrated risk of physical, psychological or financial harm to the filer or a family member of the filer (other than financial harm arising in connection with actual or potential litigation); or similarly serious reasons. Compelling reasons do not include a mere preference not to have a Form 700 posted online or similar general objections to Commission's Form 700 filing requirements and posting procedures.

5. Regulation 3.242-1.

Commission staff refers Form 700 reporting violations to the FPPC for enforcement per FPPC advice. (*See* FPPC Advice Letter to Daniel D. Purnell (6/20/00) No. A-00-098.) However, the FPPC has also indicated that it will not enforce the City's electronic filing requirements. Thus, this regulation specifies that the District Attorney, the City Attorney, and Commission may enforce those requirements. In other words, a failure to file at all will still be referred to the FPPC; however, persons submitting their Form 700 in paper format to their filing officer (i.e., not electronically) may be fined by the Commission, absent the granting of a waiver.

The proposed regulatory language follows:

Regulation 3.242-1

The Ethics Commission, City Attorney, and District Attorney may impose the administrative, civil, and criminal penalties set forth in Campaign and Governmental Conduct Code section 3.242 on any person who fails to file or fails to timely file an assuming office, annual and leaving office Form 700 Statement of Economic Interests in the electronic format prescribed by the Ethics Commission. In addition to those administrative penalties, the Ethics Commission may also issue warning letters.

Attachment A

Form 700 Electronic Filing – Summary of IP Meeting Comments (5/13/15)

Ethics Commission staff held an interested persons meeting on May 13, 2015 to discuss its proposed regulations, which impose electronic filing requirements for all City employees who file Statements of Economic Interests (FPPC Form 700).

The meeting was attended by two filing officers and two members of the public, as well as three staff members and a DCA. (Another filing officer wrote in, and was generally supportive of the effort, but requested that the system is simplified.)

The attendees were generally supportive of requiring electronic filing and of posting Form 700s on the Commission's website. One filing officer thought it would simplify the filing process, while another thought that it would be additional work for her. Most of the discussion concerned the four issues below:

1. Non-City filers. Staff's original draft regulations did not require electronic filing by employees of non-City agencies who are nevertheless designated as filers in the City's conflict of interest code. Examples include designated employees of the Successor Agency to the Redevelopment Authority, the Community College District, San Francisco Unified School District, the Health Authority, the Law Library, and the Housing Authority. One member of the public stated that these employees should file electronically. Staff's memorandum addresses this issue.

2. Privacy/Redaction Issues. There were concerns about privacy: namely, that employees' personal information (particularly information related to spouses and tenants) would be so freely available online. While there was agreement that Form 700s should not be posted when there are demonstrated compelling reasons (but see number 3 below), there was less consensus on what (and whether) information should be redacted from Form 700s posted online.

Information	Group Comments
Filer's street address	Most did not object to redaction.
Filer's phone number	One member of the public objected to redaction because phone numbers might allow the public to connect various reported entities.
Filer's email address	Most did not object to redaction.
Street address information for economic interests (other than real property)	One member of the public objected to redaction, particularly for addresses of business which could potentially be impacted by governmental decisions.
Names of sources of rental income	The group agreed that these name should be redacted given the renter's privacy interests.

In short, staff still believes that that Netfile's default redaction of the information above is appropriate.

3. Waiver requests. The original draft regulations allowed a filer to obtain a waiver from the electronic filing requirement (and thus not have his or her information posted online), and to have the Ethics Commission take down a Form 700 that has been posted online. In each case, the filer must provide compelling reasons for his or her request.

Two members of the public requested that the regulations further define what constitutes a "compelling reason." One attendee suggested defining it as a demonstrated risk of harm or harassment to the filer or another, while another suggested that it merely be a situation that distinguishes the filer from other filers. Staff agrees with the general suggestion, and has included a draft definition in the proposed regulation.

Also, the original draft regulations required approval from the Ethics Commission Executive Director and the filing officer for a waiver from the filing requirement, but only approval from the Executive Director to take down a Form 700 posted online. One member of the public asked whether the filing office should also approve a request to take down a Form 700 posted online, while another thought that the Commission should make this decision.

Staff believes that a Commission decision would likely take too long to effectively address filer concerns and that the definition of "compelling reasons" will ensure that waivers are appropriately granted.

4. Enforcement. One member of the public strongly objected to the ability of the Commission to enforce electronic filing requirements for Form 700s. He stated that state law allows the City to permit electronic filing, but does not allow the City to require electronic filing. However, staff understands that the Commission does in fact have the ability to impose and enforce electronic filing requirements for Form 700s.

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations)

§ 18313.5. Online Posting.

(a) Not later than 10 days after issuance or receipt by the Commission, the Commission shall post the following information on its website:

(1) Commission opinions issued pursuant to subdivision (a) of Section 83114.

(2) Staff advice letters issued pursuant to subdivision (b) of Section 83114.

(3) Warning, advisory, and closure letters issued by the Enforcement Division.

(4) Behested payments reports filed with the Commission pursuant to subdivision (b)(2)(B)(iii) and (b)(3) of Section 82015.

(b) The Commission shall also post on its website all statements of economic interests required to be filed with the Commission on or after January 1, 2010, by elected officers in their elected capacity. The address, telephone number, and signature block of the elected official's statement will be redacted from the cover page of the document before posting to the website. The statement of economic interests will be posted as soon as possible after the document is filed with the Commission.

(c) The information required to be posted on the Commission's website under subdivisions (a) and (b) shall remain posted on the website until the members of the Commission approve its removal.

Note: Authority cited: Section 83112, Government Code. Reference: Section 81002 and 83113, Government Code.

HISTORY

1. New section filed 6-17-2010; operative 7-17-2010. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2010, No. 25).

2. Change without regulatory effect amending subsection (c) filed 7-8-2010 pursuant to section 100, title 1, California Code of Regulations (Register 2010, No. 28).

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations)

§ 18313.6. Online Posting: Redacting Personal Information.

(a) At the request of an elected officer, Commission Staff shall redact the following information from the official's statement of economic interest for purposes of the online posting under Regulation 18313.5(b) if the elected officer has a reasonable privacy concern related to an individual's address, or a family member's name or other personally identifiable information:

(1) The address of the individual.

(2) The name of the family member.

(3) The address of an entity at which the family member is employed.

(4) The name of any entity if the name of the entity would reveal the name of the family member or the address at which the family member lives or is employed.

(b) For purposes of this regulation a family member includes an official's spouse or former spouse including a registered domestic partner or former registered domestic partner; child or step-child; parent; grandparent; grandchild; brother; sister; current or former parent-in-law, brother-in-law, or sister-in-law; nephew; niece; aunt; uncle; grand nephew; grand niece; grand aunt; grand uncle; first cousin; first cousin once removed; or spouse or former spouse of these persons other than a former in-law.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 81002 and 83113, Government Code.

HISTORY

1. New section filed 6-4-2012; operative 7-4-2012. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California

Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2012, No. 23).

Mainardi, Jesse (ETH)

From: LARRY BUSH <sfwtrail@mac.com>
Sent: Monday, June 22, 2015 9:41 AM
To: Paul Renne; BrettA@positiveresource.org; beverlyhayon46@icloud.com; Benedict Y. Hur; Peter Keane
Cc: St.Croix, John; Mainardi, Jesse (ETH)
Subject: SEI Filing Issue at Commission June 29

Chair Renne, Commissioners:

Friends of Ethics requests that the proposed regulation on electronic filing of Statements of Economic Interest announced for discussion at the June 29 Commission meeting be handled by establishing specific discussion points for the Commission to approve.

This approach will allow for a better and more robust examination of the issues involved in this proposed regulation, and is consistent with the approach Ethics has taken on other changes.

Electronic Filing of Statements of Economic Interest (Form 700). State law now requires that these forms be filed electronically. The issue before Ethics are these points:

Decision Point 1: Friends of Ethics believes all files should be placed with the Ethics Commission. At the Interested Persons meeting, the Deputy City Attorney advised that the proposed regulation that identifies filers as "city employees" would not include filers at the Housing Authority, the Office of Community Investment and Infrastructure (formerly the Redevelopment Agency), filers at the Community College or School Board, or appointees who participate in reviewing and recommending contracts and other city decisions.

Decision Point 2: Friends of Ethics believes that the system should be robust for open data and search to allow public inspection of disclosures from various relevant angles. This means being able to readily identify how many filers report gifts of tickets to events, investments in regulated businesses or those seeking contracts or development approvals, or other aspects. If this involves an addiitional cost, Friends of Ethics recommends that a supplemental appropriation specific to this effort be requested now, while the Board is considering the coming budget.

Decision Point 3: The proposed exemptions to allow filers to avoid public scrutiny of their financial interests lacks clarity or a reasonable standard. It relies on a "compelling reason" but fails to provide illustrative examples and criteria. In the past and recently, some filers have sought to claim this unprecedented exemption without success. This proposed regulation would now incorporate into Ethics regulations exactly the kind of evasion of public disclosure that is at the core of the public disclosure of Statements of Economic Interest. Any potential conflicts would never be seen by the public.

Decision Point 4: Penalties and Enforcement need to be enhanced. Current practice at Ethics is to levy a $10 a day late penalty for nonfilers to a maximum of $100, even if a filer does not produce the required documents for a full year. The practice has been to refer late filers to the state Fair Political Practices Commission. However, the FPPC actually has limited authority and has no authority to undertake a criminal prosecution.

We believe the regulations should clearly state that late filers will be referred to their appointing authority or to appropriate city agencies with a recommendation that includes consequences up to and including dismissal. In

cases where filers have failed to properly or fully identified reportable information, we believe the regulation should state that those filings will be referred to the District Attorney and City Attorney for further action. It needs to be acknowleged that a false filing could be a case of perjury.

For example, former supervisor Ed Jew filed a statement claiming that a payment he received was allowable when it actually was an apparent bribe. The Ethics Executive Director, apparently on his own initiative, returned the signed documents to then-supervisor Jew but the record does not show that the original signed documents were given to the District Attorney, City Attorney or U.S. Attorney. It was another eight months before sufficient evidence was collected to begin action to remove Mr. Jew from office. A strong and clear policy on enforcement in the regulation will be a step in addressing this gap.

In cases that are referred to the FPPC and that agency takes action, we believe those facts should be posted on Ethics internet site so that the public is informed that compliance with the law has consequences. As things currently operate, the public receives no information from Ethics on the status of referrals made to the FPPC or other agencies.

We appreciate the Commission's decision to post the regulations in advance with sufficient opportunity for the public to comment at the upcoming Commission meeting. We respectfully submit these comments in that spirit

Larry Bush
for Friends of Ethics

Ethics proposed regulation:

http://www.sfethics.org/files/draft_regulations_for_electronic_filing_of_form_700s_6.15.15.pdf

MESSING ADAM & JASMINE

SACRAMENTO
SAN FRANCISCO

Jonathan Yank
jonathan@majlabor.com
direct 415.266.1802

June 24, 2015

VIA E-MAIL AND REGULAR MAIL

Micki Callahan
Director of Human Resources
City and County of San Francisco
One South Van Ness Avenue, 4th Floor
San Francisco, CA 94103-5413

Re: Demand to Meet and Confer Over Proposed Changes to Form 700
File No.: 034861

Dear Micki:

We write on behalf of our client, the San Francisco Municipal Executives Association ("MEA"), to demand an opportunity to meet and confer over the proposed changes related to required Form 700 filings. We further demand that submission of the proposed changes to the Ethics Commission be delayed until that process has been completed.

To date, the City has only offered a cursory "meet and discuss," which was held on June 19, 2015, a mere 10 calendar days before the proposed changes are scheduled to go before the Ethics Commission for adoption. Such a limited opportunity to "discuss" such dramatic and far reaching changes is entirely unacceptable and unlawful. Because the proposed changes will significantly impact employees in regard to matters within the scope of bargaining, the City is required to provide notice and a reasonable opportunity to bargain over those impacts. (Gov. Code § 3504.5 and 3505.)

As a starting matter, we are extremely disappointed that the City failed to recognize just how significant the proposed changes are and the impact they will have on City employees, including MEA members. For example, it appears that the proposed changes to Form 700 filings will—for the first time—require hundreds (if not thousands) of employees to make personal information readily accessible to the public through the Ethics Commission website.

Currently, employees, other than department heads, are only required to file a Form 700 at the departmental level. Those forms are kept on site and are only available to the public upon submission of a specific information request. Posting such information on a website will inevitably increase the exposure of MEA members' personal financial information. These employees may also be subject to additional state rules and regulations (e.g. gifts). Many of these employees probably are not required to file, but have simply been included in

the departmental filings as a matter of convenience or practice. They certainly did not understand or agree that the information could be posted publicly.

It should go without saying that the proposed reporting changes will have a significant impact on the terms and conditions of MEA members' employment, as they open employees up to increased scrutiny over personal, financial matters, as well subjecting them to possible discipline based on a violation of those rules. (Gov. Code § 3504; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 631; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 659.)

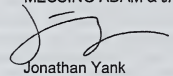
The duty to bargain requires that the City refrain from making unilateral changes to working conditions until the parties have bargained to impasse over matters within the scope of bargaining. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591,597.) Thus, before it may proceed, the City must meet with MEA (and other interested associations) for as long as it takes to freely exchange information, opinions, and proposals, and to endeavor to reach agreement regarding such matters.

Given that the Ethics Committee intends to consider the proposed changes at its meeting next week, MEA needs an immediate response from the City but no later than close of business tomorrow, June 25, 2015. If the City fails to respond or will not agree to MEA's demands, we will take any course of action necessary including seeking a temporary restraining order and preliminary injunction in the Superior Court.

Please do not hesitate to contact the undersigned with any questions.

Very truly yours,

MESSING ADAM & JASMINE LLP



Jonathan Yank

JY:jag
cc: Martin R. Gran, Director Employee Relations
Rebecca Rhine, MEA Executive Director
Gregg McLean Adam, Esq.

LEGISLATIVE DIGEST

[Initiative Ordinance - Campaign and Governmental Conduct Code - Expenditure Lobbyists]

Ordinance amending the Campaign and Governmental Conduct Code to require expenditure lobbyists to register with the Ethics Commission and file monthly disclosures regarding their activities.

Existing Law

San Francisco does not currently regulate expenditure lobbying, i.e., making payments to urge others to directly lobby City officers.

Amendments to Current Law

The Ethics Commission (the "Commission") seeks to regulate the activities of expenditure lobbyists. In this proposal, an expenditure lobbyist is defined as:

> any person, other than any government entity, or officer or employee acting in an official capacity, who makes payments totaling $2,500 or more in a calendar month to solicit, request, or urge, directly or indirectly, other persons to communicate directly with an officer of the City and County in order to influence local legislative or administrative action.

Section 2.105. For the purpose of determining whether a person has met the $2,500 threshold, the following types of payments would not be considered:

- payments made to a registered contact lobbyist or the registered contact lobbyist's employer for lobbyist services;
- payments made to an organization for membership dues;
- payments made by an organization to distribute communications to its members;
- payments made by a news media organization to develop and distribute its publications; and
- payments made by a client to a representative to appear before an adjudicatory proceeding before a City agency or department.

Id. Otherwise, the proposal does not incorporate the exceptions that currently exist for contact lobbying. *See* Section 2.106. Thus, for example, there are no exceptions for the following:

- labor unions representing City employees;
- prospective City contractors bidding on a City contract, or negotiating a contract with a City agency; and

- non-profit organizations.

In general, a person who qualifies as an expenditure lobbyist is subject to the same regulatory scheme as an individual lobbyist who directly lobbies a City officer (referred to as a "contact lobbyist"). Specifically, an expenditure lobbyist would be required to register with the Ethics Commission, pay a $500 registration fee, and file monthly disclosures regarding their lobbying activities. Section 2.110.

The measure also provides that it can be later amended by the Commission and the Board of Supervisors. Consistent with similar provisions found in the Campaign Finance Reform Ordinance and the Government Ethics Ordinance, an amendment may be made if:

- the amendment furthers the purposes of this Chapter, the Board of Supervisors makes a finding that the amendment furthers the purposes of this Chapter and provides specifics to substantiate the finding, and the amendment does not result in reduced disclosure;
- the Ethics Commission approves the proposed amendment in advance by at least a four-fifths vote of all its members;
- the proposed amendment is available for public review at least 30 days before the amendment is considered by the Board of Supervisors or any committee of the Board of Supervisors; and
- the Board of Supervisors approves the proposed amendment by at least a two-thirds vote of all its members.

Lastly, the measure would appropriate $560,000 to the Commission for its administration and enforcement of this proposal in Fiscal Year 2015-16. Of this amount, the Commission plans to use approximately $500,000 to expand its electronic filing system to accommodate expenditure lobbyist registration and reporting, and $60,000 for staff time to establish and start up this new program. It also requests that the City continue to fund this program with an ongoing, annual appropriation of $15,000.

Background Information

The Ethics Commission may place ordinances "relating to conflicts of interest, campaign finance, lobbying, campaign consultants or governmental ethics" by a four-fifths vote. S.F. Charter § 15.102.

Other jurisdictions that have similarly regulated expenditure lobbying, or similar activities, include Los Angeles, Sacramento, San Diego, San Jose, and the State of California. *See* Los Angeles Mun. Code § 48.02 (defining "major filer"); Sacramento Mun. Code § 2.15.050; San Diego Mun. Code section 27.4002; San Jose Mun. Code § 12.12.180; and Cal. Gov. Code §§ 86115-18 (provisions addressing "$5,000 filers").

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[Initiative Ordinance - Campaign and Governmental Conduct Code - Expenditure Lobbyists]

Motion ordering submitted to the voters an ordinance amending the Campaign and Governmental Conduct Code to require expenditure lobbyists to register with the Ethics Commission and file monthly disclosures regarding their activities, at an election to be held on November 3, 2015.

MOVED, That pursuant to Charter section 15.102, the Ethics Commission hereby submits the following ordinance to the voters of the City and County of San Francisco, at an election to be held on November 3, 2015.

Ordinance amending the Campaign and Governmental Conduct Code to require expenditure lobbyists to register with the Ethics Commission and file monthly disclosures regarding their activities.

NOTE: **Unchanged Code text and uncodified text** are in plain font.
Additions to Codes are in *single-underline italics Times New Roman font*.
Deletions to Codes are in ~~strikethrough italics Times New Roman font~~.
Asterisks (* * * *) indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Findings.

(a) The City and County of San Francisco ("City") has a long-standing, compelling interest in furthering public disclosure of the identity of lobbyists and of their efforts to influence decision-making regarding local legislative and administrative matters. The City has

required this disclosure to protect public confidence in the responsiveness and representative nature of government officials and institutions.

(b) For many years, the City has required lobbyists who directly contact City officials, referred to here as "contact lobbyists," to register with the Ethics Commission and disclose their lobbying activities. But in addition to contact lobbyists, individuals, businesses, non-profit organizations, labor unions, and trade associations attempt to indirectly influence City officials by urging others to directly lobby those officials. These indirect lobbyists, referred to in this measure as "expenditure lobbyists," make payments in an attempt to encourage others to directly lobby City officials by urging them to attend legislative hearings to speak on their behalf, by providing them with transportation to public meetings, by using advertising outlets to ask others to call or contact City officials' offices to make their arguments, or by making donations in exchange for their direct lobbying efforts. Given these efforts, it is often difficult for City officials to know whether the individuals directly approaching them are truly voicing their own opinions or are doing so at the behest of expenditure lobbyists.

(c) For these reasons, and consistent with the City's past efforts to further the goals of open government and transparency in decision-making, the voters enact this ordinance to impose registration and disclosure requirements on expenditure lobbyists. This approach is not unique to San Francisco. Several other California jurisdictions, including Los Angeles, Sacramento, San Diego, San Jose, and the State of California, have enacted similar expenditure lobbyist regulations,.

(d) This ordinance imposes reasonable, narrowly tailored registration and disclosure requirements on expenditure lobbyists, obligating them to reveal information about their efforts to influence decision-making. Since expenditure lobbyists and direct, contact lobbyists both attempt to influence the City's legislative process, this ordinance imposes the same sorts of registration and disclosure requirements on both types of lobbyists.

Section 2. Article II, Chapter 1 of the Campaign and Governmental Conduct Code is hereby amended by adding Section 2.103 and revising Sections 2.105, 2.106, 2.110, 2.115, 2.116, and 2.130, to read as follows:

SEC. 2.103. AMENDMENT OR REPEAL.

With respect to any provisions of this Chapter regarding regulation of expenditure lobbyists approved by the voters, the Board of Supervisors may amend those provisions if all of the following conditions are met:

(a) The amendment furthers the purposes of this Chapter, the Board of Supervisors makes a finding that the amendment furthers the purposes of this Chapter and provides specifics to substantiate the finding, and the amendment does not result in reduced disclosure;

(b) The Ethics Commission approves the proposed amendment in advance by at least a four-fifths vote of all its members;

(c) The proposed amendment is available for public review at least 30 days before the amendment is considered by the Board of Supervisors or any committee of the Board of Supervisors; and

(d) The Board of Supervisors approves the proposed amendment by at least a two-thirds vote of all its members.

SEC. 2.105. DEFINITIONS.

Whenever used in this Chapter *1*, the following words and phrases shall ~~*have the definitions*~~ *be defined as* provided in this Section *2.105*:

"Activity expenses" means any expense incurred or payment made by a lobbyist or a lobbyist's client at the behest of the lobbyist, or arranged by a lobbyist or a lobbyist's client at the behest of the lobbyist, which benefits in whole or in part any: officer of the City and

County; candidate for City and County office; aide to a member of the Board of Supervisors; or member of the immediate family or the registered domestic partner of an officer, candidate, or aide to a member of the Board of Supervisors. An expense or payment is not an "activity expense" unless it is incurred or made within three months of a contact with the officer, candidate, or Supervisor's aide who benefits from the expense or payment, or whose immediate family member or registered domestic partner benefits from the expense or payment. "Activity expenses" include honoraria, consulting fees, salaries, and any other thing of value totaling more than $25 in value in a consecutive three-month period, but do not include political contributions.

"Candidate" shall have the same meaning as set forth in Section 1.104 of this Code.

"Client" means the person for whom lobbyist services are performed by a lobbyist.

"Contact lobbyist" means any individual who (1) makes five or more contacts in a calendar month with officers of the City and County on behalf of the individual's employer; or (2) makes one or more contacts in a calendar month with an officer of the City and County on behalf of any person who pays or who becomes obligated to pay the individual or the individual's employer for lobbyist services. An individual is not a contact lobbyist if that individual is lobbying on behalf of a business of which the individual owns a 20% or greater share.

"Economic consideration" means any payments, fees, reimbursement for expenses, gifts, or anything else of value, provided that "economic consideration" does not include salary, wages or benefits furnished by a federal, state or local government agency.

"Employee" means any person who receives, reasonably expects to receive, or whose employer is obligated to provide, an Internal Revenue Service Form W-2 wage and tax statement.

"Employer" means any person who provides an Internal Revenue Service Form W-2 wage and tax statement to an employee who performs lobbyist services on behalf of that person.

"Expenditure lobbyist" means any person, other than any government entity, or officer or employee acting in an official capacity, who makes payments totaling $2,500 or more in a calendar month to solicit, request, or urge, directly or indirectly, other persons to communicate directly with an officer of the City and County in order to influence local legislative or administrative action. Examples of the types of activities the payment for which can count toward the $2,500 threshold referred to in the previous sentence include but are not limited to public relations, media relations, advertising, public outreach, research, investigation, reports, analyses, studies. The following types of payments shall not be considered for the purpose of determining whether a person is an expenditure lobbyist: payments made to a registered contact lobbyist or the registered contact lobbyist's employer for lobbyist services; payments made to an organization for membership dues; payments made by an organization to distribute communications to its members; payments made by a news media organization to develop and distribute its publications; and payments made by a client to a representative to appear before an adjudicatory proceeding before a City agency or department.

"Gift" shall be defined as set forth in the Political Reform Act, Government Code Section 81000 et seq., and the regulations adopted thereunder.

"Lobbyist" means *a contact lobbyist or expenditure lobbyist.* ~~*any individual who (1) makes five or more contacts in a calendar month with officers of the City and County on behalf of the individual's employer; or (2) makes one or more contacts in a calendar month with an officer of the City and County on behalf of any person who pays or who becomes obligated to pay the individual or the individual's employer for lobbyist services. An individual is not a lobbyist if that individual is lobbying on behalf of a business of which the individual owns a 20% or greater share.*~~

"Lobbyist services" means services rendered for the purpose of influencing local legislative or administrative action, including but not limited to contacts with officers of the City and County of San Francisco.

"Local legislative or administrative action" includes, but is not limited to, the drafting, introduction, consideration, modification, enactment, defeat, approval, veto, granting or denial by any officer of the City and County of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement to use or contract.

"Measure" shall have the same meaning as set forth in Section 1.104 of this Code.

"Officer of the City and County" means any officer identified in Section 3.203 of this Code, as well as any official body composed of such officers. In addition, for purposes of this Chapter, "officer of the City and County" includes (1) members of the Board of Education, Community College Board, First Five Commission, Law Library Board of Trustees, Local Agency Formation Commission, Health Authority Board, Housing Authority Commission, Parking Authority, Relocation Appeals Board, Successor Agency to the former Redevelopment Agency of the City and County of San Francisco, Oversight Board of the Successor Agency, Successor Agency Commission, Transportation Authority, Workforce Investment San Francisco Board as well as any official body composed of such officers, and any person appointed as the chief executive officer under any such board or commission; (2) the Zoning Administrator, (3) the City Engineer, (4) the County Surveyor, and (5) the Bureau Chief of the Department of Public Works' Bureau of Street Use and Mapping.

"Person" means an individual, partnership, corporation, association, firm, labor union or other organization or entity, however organized.

"Public hearing" means any open, noticed proceeding.

SEC. 2.106. LOBBYING CONTACTS.

(a) Whenever used in this Chapter *1*, "contact" means any communication, oral or written, including communication made through an agent, associate or employee, for the purpose of influencing local legislative or administrative action, except as provided in Subsections (b) and (c).

(b) The following activities are not "contacts" within the meaning of this Chapter *1*.

(1) A representative of a news media organization gathering news and information or disseminating the same to the public, even if the organization, in the ordinary course of business, publishes news items, editorials or other commentary, or paid advertisements, that urge action upon local legislative or administrative matters;

(2) A person providing oral or written testimony that becomes part of the record of a public hearing; provided, however, that if the person making the appearance or providing testimony has already qualified as a *contact* lobbyist under this Chapter and is appearing or testifying on behalf of a client, the *contact* lobbyist's testimony shall identify the client on whose behalf the *contact* lobbyist is appearing or testifying;

(3) A person performing a duty or service that can be performed only by an architect or a professional engineer licensed to practice in the State of California;

(4) A person making a speech or producing any publication or other material that is distributed and made available to the public, through radio, television, cable television, or other medium of mass communication;

(5) A person providing written information in response to an oral or written request made by an officer of the City and County, provided that the written information is a public record available for public review;

(6) A person providing oral or written information pursuant to a subpoena, or otherwise compelled by law or regulation;

(7) A person submitting a written petition for local legislative or administrative action, provided that the petition is a public record available for public review;

(8) A person making an oral or written request for a meeting, or any other similar administrative request, if the request does not include an attempt to influence local legislative or administrative action;

(9) A person appearing before an officer of the City and County pursuant to any procedure established by law or regulation for levying an assessment against real property for the construction or maintenance of an improvement;

(10) A person providing purely technical data, analysis, or expertise in the presence of a ~~*registered*~~ *contact* lobbyist;

(11) A person distributing to any officer of the City and County any regularly published newsletter or other periodical which is not primarily directed at influencing local legislative or administrative action;

(12) A person disseminating information or material on behalf of an organization or entity to all or a significant segment of the organization's or entity's employees or members;

(13) A person appearing as a party or a representative of a party in an administrative adjudicatory proceeding before a City agency or department;

(14) A person communicating, on behalf of a labor union representing City employees, regarding the establishment, amendment, or interpretation of a collective bargaining agreement or memorandum of understanding with the City, or communicating about a management decision regarding the working conditions of employees represented by a collective bargaining agreement or a memorandum of understanding with the City;

(15) A party or prospective party to a contract providing oral or written information in response to a request for proposals, request for qualifications, or other similar request, provided that the information is directed to the department or official specifically

designated in the request to receive such information; negotiating the terms of the contract with the City after being selected to enter into the contract; or communicating in connection with the administration of an existing contract between the party and the City. For the purposes of this *Ssubsection (b)(15)*:

(A) A "party or prospective party" includes that party's officers or employees; a subcontractor listed in the contract, bid, or proposal; or that subcontractor's officers or employees. A "party or prospective party" does not include any other agent or associate, including any outside consultant or independent contractor.

(B) Communication "in connection with the administration of an existing contract" includes, but is not limited to, communication regarding: insurance and bonding; contract performance and/or default; requests for in-scope change orders; legislative mandates imposed on contractors by the City and County; payments and invoicing; personnel changes; prevailing wage verification; liquidated damages and other penalties for breach of contract; audits; assignments; and subcontracting. Communication "in connection with the administration of an existing contract" does not include communication regarding new contracts, or out-of-scope change orders.

(16) An officer or employee of a nonprofit organization or an organization fiscally sponsored by such a nonprofit organization communicating on behalf of their organization. For purposes of this subsection only, "nonprofit organization" means either an organization with tax exempt status under 26 United States Code Section 501(c)(3), or an organization with tax exempt status under 26 United States Code Section 501(c)(4) whose most recent federal tax filing included an IRS Form 990-N or an IRS Form 990-EZ, or an organization whose next federal tax filing is reasonably likely to include an IRS Form 990-N or an IRS Form 990-EZ.

(c) The following activities are not "contacts" for the purpose of determining whether a person qualifies as a *contact* lobbyist, but are "contacts" for purpose of disclosures required by this Chapter *1*:

(1) A person providing oral information to an officer of the City and County in response to an oral or written request made by that officer;

(2) A person making an oral or written request for the status of an action; and

(3) A person participating in a public interested persons meeting, workshop, or other forum convened by a City agency or department for the purpose of soliciting public input.

SEC. 2.110. REGISTRATION AND DISCLOSURES; FEES; TERMINATION OF REGISTRATION.

(a) **REGISTRATION OF LOBBYISTS REQUIRED.** Lobbyists shall register with the Ethics Commission and comply with the disclosure requirements imposed by this Chapter *1*. Such registration shall occur no later than five business days of qualifying as a lobbyist*.* ~~*, but the*~~ *Contact* lobbyist*s* shall register prior to making any additional contacts with an officer of the City and County of San Francisco *and expenditure lobbyists shall register prior to making any additional payments to influence local legislative or administrative action*.

(b) **REGISTRATION.**

*(1) **Contact lobbyists.*** At the time of initial registration each *contact* lobbyist shall report to the Ethics Commission the following information:

(~~1~~*A*) The name, business address, e-mail address, and business telephone number of the lobbyist;

(~~2~~*B*) The name, business address, and business telephone number of each client for whom the lobbyist is performing lobbyist services;

(~~3~~C) The name, business address, and business telephone number of the lobbyist's employer, firm or business affiliation; and

(~~4~~D) Any other information required by the Ethics Commission *through regulation,* consistent with the purposes and provisions of this Chapter.

*(2) **Expenditure lobbyists.** At the time of initial registration each expenditure lobbyist shall report to the Ethics Commission the following information:*

(A) The name, mailing address, e-mail address, and telephone number of the lobbyist;

(B) Expenditure lobbyists that are entities shall provide:

(i) a description of their nature and purpose(s);

(ii) if the expenditure lobbyist is a corporation, the name of each officer and the name of any person who owns more than 20 percent of the corporation;

(iii) if the expenditure lobbyist is a partnership, the name of each partner if the entity has fewer than 10, or the name of the partner with the greatest ownership interest if the entity has 10 or more partners;

(iv) for any other type of business entity, the name of each person with an ownership interest if the entity has fewer than 10 owners, or the name of the person with the greatest ownership interest in the entity, if the entity has 10 or more owners;

(C) Expenditure lobbyists that are individuals shall provide a description of their business activities; and

(D) Any other information required by the Ethics Commission through regulation, consistent with the purposes and provisions of this Chapter.

(c) **LOBBYIST DISCLOSURES.** For each calendar month, each lobbyist shall submit the following information no later than the fifteenth calendar day following the end of the month:

(1) ***Contact lobbyists.*** *Each contact lobbyist shall report to the Ethics Commission the following information:*

(1A) The name, business address and business telephone number of each person from whom the lobbyist or the lobbyist's employer received or expected to receive economic consideration to influence local legislative or administrative action during the reporting period;.

(2B) The name of each officer of the City and County of San Francisco with whom the lobbyist made a contact during the reporting period;.

(3C) The date on which each contact was made;.

(4D) The local legislative or administrative action that the lobbyist sought to influence, including, if any, the title and file number of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement, or contract, and the outcome sought by the client;.

(5E) The client on whose behalf each contact was made;.

(6F) The amount of economic consideration received or expected by the lobbyist or the lobbyist's employer from each client during the reporting period;.

(7G) All activity expenses incurred by the lobbyist during the reporting period, including the following information:

(Ai) The date and amount of each activity expense;

(Bii) The full name and official position, if any, of the beneficiary of each activity expense, a description of the benefit, and the amount of the benefit;

(Ciii) The full name of the payee of each activity expense if other than the beneficiary;

(Div) Whenever a lobbyist is required to report a salary of an individual pursuant to this *Ssubsection (c)(1)*, the lobbyist need only disclose whether the total

salary payments made to the individual during the reporting period was less than or equal to $250, greater than $250 but less than or equal to $1,000, greater than $1,000 but less than or equal to $10,000, or greater than $10,000.

(~~8~~*H*) All ~~*political*~~ *campaign* contributions of $100 or more made or delivered by the lobbyist or the lobbyist's employer, or made by a client at the behest of the lobbyist or the lobbyist's employer during the reporting period to an officer of the City and County, a candidate for such office, a committee controlled by such officer or candidate, or a committee primarily formed to support or oppose such officer or candidate, or any committee primarily formed to support or oppose a ballot measure to be voted on only in San Francisco. This report shall include such ~~*political*~~ *campaign* contributions arranged by the lobbyist, or for which the lobbyist acted as an agent or intermediary.

The following information regarding each ~~*political*~~ *campaign* contribution shall be submitted to the Ethics Commission:

(~~A~~*i*) The amount of the contribution;

(~~B~~*ii*) The name of the contributor;

(~~C~~*iii*) The date on which the contribution was made;

(~~D~~*iv*) The contributor's occupation;

(~~E~~*v*) The contributor's employer, or if self-employed, the name of the contributor's business; and

(~~F~~*vi*) The committee to which the contribution was made.

(~~9~~*I*) For each contact at which a person providing purely technical data, analysis, or expertise was present, as described in *Section* 2.106(b)(10), the name, address, employer and area of expertise of the person providing the data, analysis or expertise.

(~~10~~*J*) Any amendments to the lobbyist's registration information required by Subsection (b).

(~~1~~*K*) Any other information required by the Ethics Commission *through regulation,* consistent with the purposes and provisions of this Chapter.

*(2) **Expenditure lobbyists.** Each expenditure lobbyist shall report to the Ethics Commission the following information:*

(A) The local legislative or administrative action that the lobbyist sought to influence, including, if any, the title and file number of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement, or contract.

(B) The total amount of payments made during the reporting period to influence local legislative or administrative action.

(C) Each payment of $1,000 or more made during the reporting period, including the date of payment, the name and address of each person receiving the payment, a description of the payment, and a description of the consideration for which the payment was made;

(D) All activity expenses incurred by the lobbyist during the reporting period, including the following information:

(i) The date and amount of each activity expense;

(ii) The full name and official position, if any, of the beneficiary of each activity expense, a description of the benefit, and the amount of the benefit;

(iii) The full name of the payee of each activity expense if other than the beneficiary;

(iv) Whenever a lobbyist is required to report a salary of an individual pursuant to this subsection (2), the lobbyist need only disclose whether the total salary payments made to the individual during the reporting period was less than or equal to $250, greater than $250 but less than or equal to $1,000, greater than $1,000 but less than or equal to $10,000, or greater than $10,000.

(E) All campaign contributions of $100 or more made or delivered by the lobbyist or made at the behest of the lobbyist during the reporting period to an officer of the City and County, a candidate for such office, a committee controlled by such officer or candidate, or a committee primarily formed to support or oppose such officer or candidate, or any committee primarily formed to support or oppose a ballot measure to be voted on only in San Francisco. This report shall include such campaign contributions arranged by the lobbyist, or for which the lobbyist acted as an agent or intermediary.

The following information regarding each campaign contribution shall be submitted to the Ethics Commission:

(i) The amount of the contribution;

(ii) The name of the contributor;

(iii) The date on which the contribution was made;

(iv) The contributor's occupation;

(v) The contributor's employer, or if self-employed, the name of the contributor's business; and

(vi) The committee to which the contribution was made.

(F) Any amendments to the lobbyist's registration information required by Subsection (b).

(G) Any other information required by the Ethics Commission through regulation, consistent with the purposes and provisions of this Chapter 1.

(d) **REGISTRATION AND FILING OF DISCLOSURES BY ORGANIZATIONS.** The Ethics Commission is authorized to establish procedures to permit the registration and filing of *contact* lobbyist disclosures by a business, firm, or organization on behalf of the individual *contact* lobbyists employed by those businesses, firms, or organizations.

(e) **FEES; TERMINATION OF REGISTRATION.**

(1) At the time of registration each lobbyist shall pay a fee of $500. On or before every subsequent February 1, each registered lobbyist shall pay an additional fee of $500.

(2) Failure to pay the annual fee by February 1 shall constitute a termination of a lobbyist's registration with the Ethics Commission. The Ethics Commission is also authorized to establish additional processes for the termination of a lobbyist's registration.

(3) The Ethics Commission shall waive all registration fees for any full-time employee of a tax-exempt organization presenting proof of the organization's tax-exempt status under 26 U.S.C. Section 501(c)(3) or 501(c)(4).

(4) The Ethics Commission shall deposit all fees collected pursuant to this Section in the General Fund of the City and County of San Francisco.

SEC. 2.115. PROHIBITIONS.

(a) GIFT LIMIT. No lobbyist shall make gifts to an officer of the City and County that have a fair market value of more than $25, except for those gifts that would qualify for one of the exemptions under Section 3.216(b) of this Code and its implementing regulations.

(b) FUTURE EMPLOYMENT. No lobbyist shall cause or influence the introduction or initiation of any local legislative or administrative action for the purpose of thereafter being employed or retained to secure its granting, denial, confirmation, rejection, passage or defea

(c) FICTITIOUS PERSONS. No *contact* lobbyist shall contact any officer of the City and County in the name of any fictitious person or in the name of any real person, except wit the consent of such real person.

(d) EVASION OF OBLIGATIONS. No lobbyist shall attempt to evade the obligations imposed by this Chapter through indirect efforts or through the use of agents, associates or employees.

SEC. 2.116. LOBBYIST TRAINING.

(a) Each *contact* lobbyist must complete a lobbyist training session offered by the Ethics Commission within one year of the lobbyist's initial registration. Thereafter, *contact* lobbyists shall attend additional training sessions as required by the Executive Director, at his or her discretion.

(b) The Ethics Commission shall make lobbyist training sessions available on its website.

(c) On or before the deadline for completing any required lobbyist training session, each *contact* lobbyist must file a signed declaration with the Ethics Commission stating, under penalty of perjury, that the lobbyist has completed the required training session.

SEC. 2.130. EMPLOYMENT OF UNREGISTERED PERSONS.

It shall be unlawful knowingly to pay any *contact* lobbyist to contact any officer of the City and County of San Francisco, if said *contact* lobbyist is required to register under this Chapter and has not done so by the deadlines imposed in this Chapter.

Section 3. Scope of Ordinance. In enacting this ordinance, the voters intend to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal Code that are explicitly shown in this ordinance as additions or deletions, in accordance with the "Note" that appears under the official title of the ordinance.

Section 4. Appropriation. There is hereby appropriated in Fiscal Year 2015-16 from any unencumbered City funds $560,000 that shall be used to fund the Ethics Commission's administration and enforcement of this ordinance. The Controller shall create an appropriate account and track the use of these funds. Any portion of this appropriation that remains unspent at the end of Fiscal Year 2015-16 shall be carried forward and spent in subsequent

years for the same purpose. Additionally, it shall be City policy in all fiscal years following Fiscal Year 2015-16 that the Board of Supervisors shall annually appropriate for this purpose $15,000, indexed for inflation, as calculated by the Controller.

Section 5. Severability. If any section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The voters hereby declare that they would have passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this ordinance or application thereof would be subsequently declared invalid or unconstitutional.

Section 6. Effective and Operative Dates. This ordinance shall become effective 10 days after the Board of Supervisors declares the results of the November 3, 2015 election. This ordinance shall become operative on February 1, 2016.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: _____
ANDREW SHEN
Deputy City Attorney

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Expenditure Lobbyist Reporting – Summary of IP Meeting Comments (6/10/15)

Commissioner Keane and staff held an interested persons meeting on June 10, 2015 to discuss a proposed measure for the November 2015 ballot, which would reinstate reporting and other requirements for "expenditure lobbyists." An updated version of the proposed draft was distributed to the nine attendees at the meeting.

Most attendees were supportive of reinstating expenditure lobbyist reporting and cited some current examples that would trigger such reporting. The discussion included a number of questions about specific language. Otherwise, attendees primarily discussed the issues below:

1. Amending the ordinance. The most recent draft included a provision allowing the Board of Supervisors to amend the ordinance by a two-thirds vote if the amendments are also available for public review for 30 days, further the purposes of the ordinance, and approved by four members of Ethics Commission. Most attendees agreed with including this provision, although there was some disagreement about whether the proposed language was adequate.

2. Triggering activity. There was substantial discussion about what type of activity the ordinance should cover. All seemed to agree that the ordinance should cover payments to induce other persons to attempt to influence City officers (also known as "indirect," "grassroots," or "astroturf" lobbying). However, there was concern that the broader definition proposed earlier had the effect of consolidating reporting requirements for expenditure lobbyists and "organization lobbyists" (i.e., those with in-house lobbyists). The consensus appeared to favor a simpler definition focusing on indirect/grassroots/astroturf lobbying.

3. Triggering threshold. Given San Francisco's monthly reporting for individual lobbyists, the most recent draft changed the qualification threshold from $5,000 in expenditures over the course of a three-month period to $2,500 in expenditures over the course of a one-month period. Although this change generated debate, it was not clear whether more attendees favored or opposed the change.

4. No nonprofit exemption. It was noted that nonprofits could trigger filing requirements in connection with their indirect/grassroots/astroturf lobbying. Most attendees opposed including an exemption for nonprofit organizations.

5. Additional issues. Certain attendees brought up a number of issues which can likely be addressed via regulation, including the definition of "executive officer," potential double reporting of contributions and gifts by contact and expenditure lobbyists, and whether persons qualifying as both contact and expenditure lobbyists must register twice.

Finding 1:

The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.

Finding 1. Partially agree. The WPO does have some limitations that can be improved. However, the confidentiality provisions for investigations are important as they protect both the complainant and the respondent during the period when accusations are proved or disproved. There is a difference between "confidentiality" and "secrecy."

Recommendation 1.1:
That the Ethics Commission recommend to the Board of Supervisors an amendment to the WPO that provides real protection for whistleblowers, in conformity with the Charter mandate of Proposition C.

Recommendation 1.1. May be implemented. The Ethics Commission is willing to suggest amendments to the WPO to the Board of Supervisors but will need the assistance of the City Attorney's Office, the Department of Human Resources and the Controller's Office. Also, due to an already heavy planned workload for this year, and in addition the upcoming election cycle, the Commission anticipates that it will not be able to begin this project until 2016. Further, should the Board of Supervisors communicate in writing to the Commission that they wish to conduct the drafting of these amendments, the Commission will defer to the Board.

Recommendation 1.3:
If the Ethics Commission requests that the Board amend the WPO and the Board fails to act, that the Commission consider submitting such an amendment directly to the voters.

Recommendation 1.3. May be implemented. If the Commission recommends amendment(s) to the Board that are not considered or not adopted, the Commission will then consider sending the amendment(s) to the voters.

Finding 2:
The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.

Finding 2. Partially agree. The WPO may not reach all aspects of complaints provided in the Charter. However, defining "providing information" in terms of oral complaints may provide difficulties in that the record of the complaint is not memorialized as the person making the complaint and the person receiving the complaint could easily have different versions of the conversation.

Recommendation 2.1:
That amendments to the WPO expand the definition of whistleblowing to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and providing information to any of the recipients listed in the Charter mandate (hereafter "listed recipients"), outside of the formal complaint or investigation process.

Recommendation: 2.2:
That these amendments further expand the scope of covered disclosures to include "providing information" to any of the listed recipients regarding improper government activities, whether or not such information is set forth in a formal complaint, or provided during an official investigation.

Recommendations 2.1 and 2.2. May be implemented. If and when the Commission considers amending the WPO, it will take these recommendations into consideration. It may be advisable to expand the scope of the definition of "providing information" but there needs to be provision for the memorializing of these reports.

Finding 3.1:
While other large California cities and counties have relatively weak laws protecting their employees from retaliation for whistleblowing, this does not relieve the Board of its responsibility under the Charter mandate, to enact an ordinance that genuinely protects whistleblowers.

Finding 3.2:
Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.

Finding 3.1 and 3.2. No disagreement.

Recommendation 3:
That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.

Recommendation 3. May be implemented. The Commission believes these recommendations may well improve the WPO and will also take them into consideration. The Commission notes that Employment Law is not part of our mandate and is normally handled by other departments. Many factors may come into consideration in this area such as MOU's and other labor agreements that are not properly part of the Ethics Commission mission. The Commission also notes that these proposals may create a large increase in staff workload.

Finding 4:
The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.

Finding 4. Partially agree. The Commission was not party to the creation of the WPO, and so is not aware of the intended scope by the creators of the ordinance.

Recommendation 4:

That amendments to the WPO include a revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.

Recommendation 4. May be implemented. As stated above, the Commission will carefully consider these recommendations when considering amending the ordinance. The Commission believes that there needs to be some demonstratable basis for a complaint in order to justify an investigation.

SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE

May 2015

City and County of San Francisco
Civil Grand Jury, 2014-2015

Members of the Civil Grand Jury

Janice Pettey, Foreperson

Philip Reed, Foreperson Pro Tem

Anne M. Turner, Recording Secretary

Leonard Brawn

Morris Bobrow

Daniel Chesir

Matthew Cohen

Jerry Dratler

Herbert Felsenfeld

Allegra Fortunati

Mildred Lee

Marion McGovern

Fred A. Rodriguez

Gary Thackeray

Jack Twomey

Ellen Zhou

THE CIVIL GRAND JURY

The Civil Grand Jury is a government oversight panel of volunteers who serve for one year. It makes findings and recommendations resulting from its investigations.

Reports of the Civil Grand Jury do not identify individuals by name.

Disclosure of information about individuals interviewed by the jury is prohibited.

California Penal Code, section 929

STATE LAW REQUIREMENT

California Penal Code, section 933.05

Each published report includes a list of those public entities that are required to respond to the Presiding Judge of the Superior Court within 60 to 90 days, as specified.

A copy must be sent to the Board of Supervisors. All responses are made available to the public.

For each finding the response must:

1) agree with the finding, or
2) disagree with it, wholly or partially, and explain why.

As to each recommendation the responding party must report that:

1) the recommendation has been implemented, with a summary explanation; or
2) the recommendation has not been implemented but will be within a set timeframe as provided; or
3) the recommendation requires further analysis. The officer or agency head must define what additional study is needed. The Grand Jury expects a progress report within six months; or
4) the recommendation will not be implemented because it is not warranted or reasonable, with an explanation.

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Executive Summary

When government employees "blow the whistle" on official wrongdoing they can suffer retaliation in the workplace. Sometimes their plight makes headlines. Occasionally they file whistleblower retaliation lawsuits that result in sizeable cash awards or settlements that are likewise newsworthy. However, when such a case arises in San Francisco it seldom sees the light of day.

Since 1989, San Francisco has enacted a series of ordinances intended to protect City officers and employees from retaliation for reporting improper government activity. Over the years the scope of these so-called "whistleblower protection" laws has narrowed, and the protections they provide are currently much weaker than those afforded government employees at the state and federal level.

In 2003 the voters of San Francisco enacted Proposition C, which added the following mandate to the City Charter: "The Board of Supervisors shall enact and maintain an ordinance... protecting City officers and employees from retaliation for filing a complaint with, or providing information to, the Controller, Ethics Commission, District Attorney, City Attorney or a City department or commission about improper government activity by City officers and employees."

In this report, we conclude that the Board has failed to carry out this mandate because it has failed to enact and maintain an ordinance that genuinely protects those who make such reports.

If a City officer or employee suffers retaliation for disclosing improper activity, he or she may file a complaint with the Ethics Commission, which investigates such complaints as part of its wider mission of enforcing local laws pertaining to government ethics and political practices. In the fifteen-year history of the Commission, no complaint of whistleblower retaliation has ever resulted in a public accusation of wrongdoing, and all complaints have been investigated in secret and dismissed without any public proceeding.

The chief reason why whistleblower retaliation complaints have fared so poorly before the Commission is the narrow scope of the current law, known as the Whistleblower Protection Ordinance (WPO). The WPO protects only those who make disclosures "in house." The whistleblower must make his or her report of government wrongdoing only to certain agencies within City government, in certain approved ways, or the WPO does not apply. It does not protect disclosures that are made by other means, or to persons or entities that are not listed in the ordinance: for example, to news media, to outside law enforcement agencies, or to elected officials outside City government. Thus, a City employee who discloses government wrongdoing or corruption to the San Francisco *Chronicle,* or to the California Attorney General, or to the F.B.I., or to Congress, is not a "whistleblower" entitled to

protection under the WPO. If retaliation ensues and the employee complains to the Commission, his/her complaint will be dismissed.

To qualify for protection, the whistleblower's disclosure must also concern a topic that is among those listed in the ordinance. The list is limited: disclosures of waste, fraud or abuse in general are not included, nor are those concerning violations of general law. Whistleblowers who disclose such information are not protected from retaliation under the WPO; again, the Commission will dismiss their complaints.

The scope of the WPO is also limited, in that it forbids only a few types of retaliatory action – termination, demotion, suspension, and similar job actions – and leaves untouched a wide variety of lesser reprisals and coercion that are nonetheless serious and potentially costly to an injured party.

Whistleblower retaliation complaints face an additional obstacle before the Commission, in that the WPO imposes on the complainant an extra "burden of proof" in such cases that does not apply to any other type of complaint. This further restricts access to the complaint procedure.

Finally – and most seriously – even if a complaint clears all of these hurdles and results in a finding of retaliation, the Commission is unable to provide relief for the whistleblower. If a job is lost due to retaliation the Commission cannot restore it. All it can do is punish the guilty party.

These shortcomings not only harm whistleblowers, they violate the Charter mandate of Proposition C: that the Board enact and maintain an ordinance protecting whistleblowers.

While there are protections against retaliation provided by Federal and California law to whistleblowers, the federal Whistleblower Protection Act applies only to federal employees and applicants for federal employment, and California law requires that in most cases the employee must take an action to court in order to obtain relief from retaliation. Civil actions are costly and time-consuming. For that reason, there is a need for the WPO. It does not require the filing of a civil suit to obtain enforcement. Yet the current version of The WPO, as enacted and administered, fails to provide a City employee with meaningful protection against retaliation for reporting improper government activity and, therefore, needs to be amended. This report identifies the shortcomings of the WPO and makes recommendations for its improvement.

Background

In July 2014 the 2013-14 San Francisco Civil Grand Jury issued a final report entitled *Ethics in the City: Promise, Practice or Pretense.* In the course of that report that Jury found that San Francisco currently lacks "a strong whistleblower program with

protections against retaliation" and urged a future Civil Grand Jury to address the issue.[1]

Based on this recommendation, the current Civil Grand Jury undertook an investigation of the anti-retaliation provisions of the San Francisco Whistleblower Protection Ordinance,[2] Section 4.115, the full text of which is attached as Appendix A.

As currently written, the ordinance is very narrow. It prohibits City officers or employees from retaliating against a whistleblower only in certain specified ways: by termination, demotion, suspension, or "other similar adverse employment action."[3] Lesser forms of retaliation such as non-promotion, or a reassignment without loss of grade or pay are not prohibited. Moreover, it applies only if the whistleblower has made a certain type of report alleging violation of certain laws. If a report is not one of those listed in the WPO, or if it concerns a violation that is not listed, then retaliation can occur and the victim will have no recourse under the WPO.

1. The Evolution of the WPO

It was not always this way.

San Francisco first addressed the question of whistleblower protection in 1989, when Mayor Art Agnos signed the Improper Government Activities Ordinance (IGAO).[4] That law authorized the Mayor to investigate reports of official misconduct by City officers and officials that violated any City, state, or federal law whatsoever; or that otherwise involved gross misconduct or gross economic waste.[5] The ordinance also forbade threats or retaliation of any kind against those who made such reports.[6] If retaliation occurred, the law allowed the injured party to sue in court for up to $5,000 in civil damages. Employees and applicants for employment were provided this right.[7]

In 1993 the voters passed Proposition K, a Charter amendment that created the Ethics Commission. Despite the breadth of the term "ethics," the Commission was charged with enforcing a relatively small number of laws relating to political practices and government ethics. These included the IGAO.[8] The IGAO itself remained unchanged.

In 2000 the Board of Supervisors repealed the IGAO and replaced it with the first version of the WPO.[9] Approved by Mayor Willie L. Brown, Jr., the new law charged the Ethics Commission, rather than the Mayor's office as required under the IGAO, with investigating whistleblower disclosures.[10] Retaliation was still broadly prohibited[11] but the range of disclosures that would qualify for protection narrowed. Those revealing violations of general law, or gross misconduct or gross economic waste were no longer covered. Now, a covered disclosure had to allege violation of one of the laws enforced by the Ethics Commission, relating to political practices or

government ethics. If it did not, then the whistleblower was not protected against retaliation.[12]

In 2002 the Board of Supervisors and Mayor Brown amended the WPO.[13] Though entitled "Expanded Protections For Whistleblowers," the amendments narrowed the definition of retaliation to include only serious job actions such as termination, demotion, or suspension. Lesser forms of retaliatory discipline such as an official reprimand that might prevent a promotion were no longer prohibited; nor were threats or coercion. Applicants for City employment who had been covered under the previous law were no longer protected.[14] The range of covered disclosures was expanded somewhat, but remained quite restrictive.[15] Again, complaints alleging violations of general law, or gross misconduct or gross economic waste were not covered.

It was against this background of shrinking protections that the voters passed Proposition C, a 2003 Charter amendment that created an additional way to file complaints of improper government activities, this time with a new unit within the Controller's office known as the City Services Auditor (CSA).[16] It also required the Controller to publicize and administer a whistleblower hotline to receive such complaints, and added a new mandate requiring the Board of Supervisors to enact an ordinance protecting whistleblowers from retaliation.[17]

Despite this mandate, the Board of Supervisors made no substantive changes to the anti-retaliation provision of the WPO.[18] Thus, the law remains essentially as it was before the Charter mandate was enacted.

2. Scope of This Report

At present, two agencies – the CSA and the Ethics Commission – handle different aspects of the City's whistleblower program.

Primary responsibility for receipt of whistleblower disclosures rests with the CSA. The unit receives disclosures from employees and others, and investigates them as part of the Controller's general audit function.[19] This process was examined in a report by the 2010-11 San Francisco Civil Grand Jury report issued in July 2011.[20]

If a whistleblower believes that he or she has suffered retaliation for making a disclosure to the Controller, or various other agencies within City government, he or she may file a complaint with the Ethics Commission. The Commission is an independent agency that investigates such complaints as part of its law enforcement function.[21] No recent Civil Grand Jury report has examined this program.

When this Jury was empaneled, the 2010-11 Civil Grand Jury's report on the CSA was just three years old. In light of that fact, we chose not to repeat their inquiry. Instead, we limited our investigation to the Ethics Commission, and the anti-retaliation provisions of the WPO, which the Commission is charged to enforce.

Methodology

Members of the Jury conducted legal research using materials from the Government Information Center of the San Francisco Public Library, the online compilation of local ordinances provided by the Board of Supervisors, and other online resources provided by the City and other government entities.

We also relied on reports and other materials provided online by the Ethics Commission and the Office of the Controller. We interviewed members and staff of the Ethics Commission, the Office of the Controller, the City Attorney, the Board of Supervisors, as well as persons who filed retaliation complaints with the Commission. Additionally, we reviewed the documents and statistics provided to us by those agencies and interviewees.

Discussion

1. Whistleblower Retaliation Complaints before the Ethics Commission

Based on interviews with Ethics Commission staff and a review of the Commission's written regulations,[22] we summarize the Commission's complaint-handling process as follows.

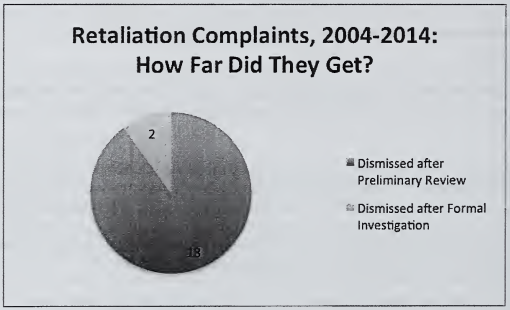
Preliminary Review. Complaints are received formally and informally, either via a form on the Commission's website or by other written or oral means. Investigators will listen to any complaint, and if it is within the Commission's jurisdiction they will look into it. That inquiry may include reviewing documents, communicating with the complainant, communicating with the person accused of wrongdoing, and other inquiries to determine whether a full investigation is warranted.

Referral to District Attorney, City Attorney. If, after preliminary review, the Commission's staff finds that there is "reason to believe that a violation of law may have occurred,"[23] they refer the matter to the District Attorney and the City Attorney for possible action. If those offices decline to act, the Commission may initiate a formal investigation.

Formal Investigation. During a formal investigation Commission staff researches the matter in depth, gathers evidence, and may take sworn statements from the accused or others. If staff concludes that there is "probable cause to believe that a violation occurred" they report this to the Commission.[24] In this context "probable cause" means "there is reason to believe that the respondent" – meaning the accused – "committed a violation of law."[25]

Further Proceedings. The Commission will then consider the matter in closed session, and determine whether there is "a reasonable ground to suspect that the respondent has committed the violation" in question.[26] If so, it may issue a public Accusation and conduct a public hearing on the merits.[27] No whistleblower retaliation complaint has ever reached this stage. Indeed, Commission records show that since its inception in 2000, only two such complaints have ever survived preliminary review to become the subject of a formal investigation. Both were dismissed without resulting in a formal Accusation or any public action against the alleged retaliator.[28]

The Commission's staff confirmed this in interviews and through statistics they compiled at the Jury's request. They state that from January 1, 2004 through November 18, 2014, the Commission received 20 complaints that alleged either the type of whistleblowing or the type of retaliatory action that falls within the coverage of the WPO. Of those 20, eighteen were dismissed by the Executive Director after staff conducted a preliminary review, and two were dismissed by the Ethics Commission after staff initiated a formal complaint and conducted a formal investigation.



The Jury also asked Commission staff to provide statistics on the total number of retaliation complaints received by the commission, and whether or not the allegations satisfied the requirements of the WPO. Due to record-keeping constraints, staff was able to only provide this information for complaints received since January 1, 2011. From that date through November 18, 2014 the Commission received, and the Executive Director dismissed, a total of 34 whistleblower retaliation complaints, 15 of which alleged neither the type of whistleblowing nor the type of retaliatory action that is covered under the WPO. Thus, 44% of whistleblower retaliation complaints received during the last four years fell outside the scope of the WPO.

Commission staff members receive a substantial number of complaints that seem quite serious, from whistleblowers who have apparently suffered acts of retaliation, that must still be dismissed – either because the type of whistleblowing, or the type of retaliation that took place falls outside the parameters of the ordinance. This is the chief reason why retaliation complaints have fared so poorly before the Commission.

The WPO protects only those who make disclosures "in house." As already noted, the whistleblower must make his or her report of government wrongdoing only to certain agencies within City government, in certain approved ways, or the WPO does not apply. Approved recipients are the Ethics Commission, the Controller, the District Attorney, the City Attorney, and the whistleblower's own department. Reports to the four named agencies must be in the form of a "complaint"; those to the whistleblower's department must be "in writing."[29]

The WPO does not protect disclosures that are made by other means, or to persons or entities that are not listed in the ordinance: for example, to news media, to outside law enforcement agencies, or to elected officials outside City government. Thus, a City employee who discloses government wrongdoing or corruption to the San Francisco *Chronicle,* or to the California Attorney General, or to the F.B.I., or to Congress, is not a "whistleblower" entitled to protection under the WPO. If retaliation ensues and the employee complains to the Commission, his/her complaint will be dismissed.

The whistleblower's disclosure must also concern an enumerated subject. It must show that a City officer or employee violated a local ordinance governing political practices or government ethics; misused City resources so seriously that a crime was committed; endangered public health or safety; or took official action that advanced a private interest.[30] Disclosures of waste, fraud or abuse in general are not protected; nor are those concerning violations of general law.

The scope of the WPO is also limited, in that it forbids only certain types of retaliatory action and leaves untouched a wide variety of other coercive actions and reprisals that are nonetheless serious, and potentially costly to an injured party. Under the WPO, City officers or employees may not "terminate, demote, suspend or take other similar adverse employment action" against those who make a disclosure covered under the WPO. There is no explicit coverage for threats, intimidation, lesser forms of discipline, or for other job actions such as transfer, detail, reassignment, change in duties, adverse performance evaluations or failure to promote.[31]

Ethics Commission staff told us that in evaluating whistleblower retaliation complaints they liberally construe the phrase "similar adverse employment action" to include most other serious job actions, including non-disciplinary ones. The language of the WPO does not support such an interpretation. Termination, demotion and suspension — the only actions specified in the ordinance — are disciplinary actions that result in loss of job status and/or pay. If an employee is not selected for promotion or receives a performance evaluation of "above average" instead of "outstanding" there has been neither discipline nor loss of job status or pay. Such actions are not "similar" to termination, demotion or suspension in that respect, as they must be to qualify as "retaliation" under the WPO. That Ethics Commission staff is willing to treat them as such is further evidence that the definition needs to be broadened in order to fulfill the purpose of the ordinance.

Finally, some complainants are excluded from WPO protection because of their job status. As noted by our predecessor Civil Grand Jury,[32] the ordinance covers only City officers and employees. It does not cover applicants for City employment, or employees or applicants for employment with City contractors – even those who work side-by-side with City employees.[33] Statistics compiled by Commission staff show that since 2011, three retaliation complaints have been submitted by contractor employees, and one by an applicant for City employment. They comprised more than 10% of retaliation complaints received during that period, and all were dismissed because such employees are not covered by the WPO.

2. The "Burden of Proof" in Whistleblower Retaliation Complaints

Whistleblower retaliation complaints face an additional hurdle before the Commission. The WPO imposes the "burden of proof" on the whistleblower in such cases, something that does not apply to any other type of complaint to the Commission.

The "burden of proof" means the obligation to prove something.[34] In a legal proceeding, one of the participants -- known as the "parties" -- must prove the case or lose it. In a civil lawsuit, the plaintiff bears this burden of proof. In a criminal trial, the prosecution bears the burden.

Complaints before the Ethics Commission are analogous to criminal proceedings. When a complaint is filed with the Commission, its staff investigates. If staff finds reason to believe that a violation of law has occurred, the Executive Director prosecutes the matter before the full Commission, which sits as a quasi-court. Like a criminal prosecutor, the Executive Director bears the burden of proof in the matter. Like a witness who reports a crime to the police, the complainant who reports a violation to the Commission is not a party to the proceeding, and normally bears no burden of proof. Rather, the parties are the Executive Director and the person accused of violating the law. This procedure is established in the City Charter[35] and applies to all cases before the Ethics Commission, including those concerning retaliation for whistleblowing.[36]

In whistleblower retaliation cases, however, the WPO imposes an additional burden of proof on the whistleblower to show by a "preponderance of the evidence" that retaliation occurred. Subsection 4.115(b)(iii) of the WPO states, "In order to establish retaliation under this Section, a complainant must demonstrate by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action."

The Commission applies this additional burden during its investigatory process. Although not a party to the proceeding, the WPO complainant must show by a "preponderance of the evidence" that retaliation occurred or the complaint will not go forward. The Commission's investigators require the complainant to meet this burden during preliminary review of retaliation complaints and also during formal investigation. If the complainant fails to do so, the complaint is dismissed without a public hearing.

A "preponderance of the evidence" means sufficient evidence to show that a factual claim is more likely true than false.[37] This is the same burden that falls on the plaintiff in civil court, to win a lawsuit. Thus, a whistleblower who complains of retaliation must "win" the case in the eyes of the Commission's staff, before they will agree to prosecute the matter.

This can be difficult, because complaints to the Commission are investigated in secret. Investigators are not required to share information with complainants, who lack the Commission's investigative resources, and may have no idea what evidence has been presented other than their own. Requiring them to prove their claims without fully participating in the procedure places a special burden on WPO complainants, that contributes to their lack of success before the Commission.

3. Remedies for Reprisal Under the WPO

Another deterrent against filing a complaint for retaliation under the WPO is that while the Commission can prosecute the person who retaliates it cannot provide

relief to the victim. Almost all complainants in whistleblower reprisal cases come to the Commission expecting to get their jobs back, or obtain some other form of relief, and are shocked to find that such relief is not available. Even if a job is lost due to retaliation, the Commission will not order reinstatement for the complainant or provide back pay or restoration of leave accruals, retirement credit, or other job benefits lost due to retaliation. All it can do is punish the retaliator.

The WPO does allow an injured party to file a civil complaint against the retaliator in state court, but limits her or his recovery to $5,000 -— an amount that is unlikely to pay even for attorney's fees and other costs of suit, much less the actual financial damages that typically result from a serious job action such as termination. Indeed, this amount is even more inadequate today than it was in 1989, when it first appeared in the Improper Government Activities Ordinance. Based on the Consumer Price Index,[38] this recovery amount is worth in 2015 about half of what it was worth in 1989, the year in which the Improper Government Activities Ordinance was enacted.

4. So Where Do They Go?

California state law provides alternative protection to City and county employees who disclose government wrongdoing or mismanagement. The relevant statutes are cited and explained in Appendix B to this report.

The most pertinent one is California Labor Code Section 1102.5, which prohibits retaliation against employees who disclose violations of law, rule or regulation, or workplace safety or health issues.[39] Covered disclosures need not be in writing, and may be made to management, other government or law enforcement agencies, or others in authority. A wide variety of retaliatory job actions are prohibited, from discharge to minor changes in the terms of employment. An injured party may seek administrative relief and may also file a civil action in court. If successful, he or she may obtain reinstatement, reimbursement for lost wages and work benefits, damages, attorney fees, and a civil penalty of up to $10,000 per violation.[40]

At the Jury's request, the Office of the City Attorney compiled data concerning lawsuits and grievances filed against the City over the last 10 years, which raised claims of retaliation for whistleblowing under any law. This data is significant, because at least some of these cases might have been resolved before the Ethics Commission, had it been willing and able to provide relief to the injured party.

In the last ten years there have been eight lawsuits against the City that raised claims of retaliation for whistleblowing. As of January 2015 three of these cases were still pending, and the other five had been resolved by settlement. One settled for $750,000, the others for more modest amounts: $115,000; $75,000; $70,000; $57,000; and $5,000. The City Attorney defends most grievances filed by unions

against the City on behalf of City officers and employees,[41] and after a diligent search, they can find no grievance that raised a claim of reprisal for whistleblowing.

Thus, City officers and employees have successfully litigated complaints of whistleblower retaliation in state court, though none has had a public hearing before the Ethics Commission. This points to the ineffectiveness of the WPO as currently written.

5. The Charter Mandate: Protection for Whistleblowers

Since 2003, the City Charter has required protection for whistleblowers. This so-called "Charter mandate," passed by the voters as part of Proposition C, states: "The Board of Supervisors shall enact and maintain an ordinance... protecting City officers and employees from retaliation for filing a complaint with, or providing information to, the Controller, Ethics Commission, District Attorney, City Attorney or a City department or commission about improper government activity by City officers and employees."[42]

"To protect" can be defined as "to keep (someone or something) from being harmed, lost, etc."[43] If the WPO is to "protect" whistleblowers, as mandated by the Charter, then it must keep them safe from harm. This may be accomplished either by preventing retaliation, or by remedying its effects.

By way of prevention, the WPO requires each City department to post a notice of whistleblower protections prepared by the Controller.[44] A copy of the current notice is attached as Appendix D. It is addressed to the potential victim of retaliation, rather than the retaliator, and consists of a rather technical explanation of the victim's right to file a complaint of retaliation. It largely repeats the language of the ordinance, and by way of warning, does little more than state that retaliation is prohibited. Neither penalties nor remedies are discussed. Similar language is included in employee outreach sessions and public postings by the Controller on its web site and elsewhere, that encourage employees to "blow the whistle" on government wrongdoing. The notice language is technical, retaliation is a secondary issue, and there is scant mention of punishment for those who retaliate.

Enforcement actions under the WPO if well publicized could have a deterrent effect against retaliation; however, this is not the case. By law, the Ethics Commission must conduct its investigations in secret, until it issues a public Accusation charging a violation of law.[45] No complaint of retaliation for whistleblowing has ever reached this stage before the Commission. All such investigations have been conducted in secret. There have been no public Accusations, no public hearings, and no public convictions of violating the WPO.

The WPO also fails to "protect" whistleblowers, in that it provides no meaningful remedy for the effects of retaliation. Though state law provides other means of

relief, this was true as well in 2003, when the voters enacted Proposition C.[46] The Board of Supervisors presumably knew this when it proposed the measure, with its mandate that the Board "enact and maintain an ordinance... protecting City officers and employees from retaliation... ."[47] We therefore infer that this mandate contemplates a meaningful set of protections at the City level, in addition to those provided in state law.

On a practical level, providing employees with relief inside City government makes good sense. Employment lawsuits are expensive. They are seldom undertaken unless the amount of money at stake is sufficient to justify the cost. They are also risky: if a case is lost, so are the costs of suit. A whistleblower may feel strongly that his suspension was retaliatory, but if it lasted only a few days and cost only a few hundred dollars in lost pay, there may be insufficient damages to warrant the risk of suit. Finally, employment lawsuits can take a great deal of time to make their way through the courts. Even if successful, the monetary relief they provide may be "too little, too late" for one who has not worked for years. A well-designed ordinance could be a useful addition to state law, if it provided a relatively quick and easy local remedy, as an alternative to lengthy, expensive court proceedings. Yet the WPO does no such thing.

6. The Charter Mandate: Definition of "Whistleblowing"

The Charter mandate defines whistleblowing as "filing a complaint with, *or providing information to*, the Controller, Ethics Commission, District Attorney, City Attorney *or a City department or commission*...."[48] (Emphasis added.) Thus, any disclosure of improper government activities, to any City commission or department whatever, should be protected by local ordinance.

The WPO defines whistleblowing more narrowly. Included are complaints filed with the Controller, Ethics Commission, District Attorney, City Attorney; complaints to the complainant's department, but only if they are made in writing; and information provided during an investigation by the Ethics Commission or the Controller.[49] Excluded are oral complaints to the complainant's department, and complaints to other City departments or commissions. Also excluded is "providing information" in general, outside of a formal complaint or investigation.

The Charter mandate imposes no such restrictions. It requires protection "for filing a complaint with, or providing information to" any of the listed recipients – including any City department or commission – without regard to how such information is provided.

7. Comparable Laws Protecting Government Employees In Other Jurisdictions

For purposes of comparison, the Jury surveyed whistleblower protections that are available to government employees at the state and federal level, and also in comparable communities around the state.

The federal government and the state of California afford their employees strong protection. Whistleblowers are covered whether their disclosures are made "in house" or outside of government, to those in authority or the public at large. Protected disclosures may concern nearly any kind of government wrongdoing, including violations of law, mismanagement, safety hazards, waste of funds, or abuse of authority. The definition of retaliation is just as broad, covering nearly every type of job action from termination to routine decisions concerning work assignments, pay, leave, and other benefits. These protections extend not only to federal and state employees, but to applicants for government employment as well. If retaliation occurs the whistleblower can obtain full relief, up to and including restoration to a lost position, back pay and related benefits, money damages, attorney's fees and costs.[50] Further analysis of these laws may be found in Appendix B to this report.

By contrast to federal and state law, the other large cities and counties that we surveyed provide relatively weak protection for local government employees who "blow the whistle." We surveyed the whistleblower laws of Los Angeles, San Diego, San Jose and Oakland, and the counties of Santa Clara, Alameda and Los Angeles.[51] Appendix C catalogues these provisions, briefly described as follows.

The definition of "whistleblowing" varies from place to place. Some jurisdictions protect only disclosures that are made "in house," to one of their own agencies (Oakland, San Diego, Santa Clara County, Los Angeles County); while others protect those made inside and outside government (Alameda County, San Jose, Los Angeles). Some protect only disclosures that involve specific violations of law (Santa Clara County, Los Angeles, San Diego), while others protect those that concern a wide range of improper activities (Alameda County, Oakland, Los Angeles County, San Jose).

In general, retaliation is broadly defined. Most of the cities and counties we surveyed prohibit almost any retaliatory job action (Alameda County, Oakland, San Jose, San Diego); while others forbid "retaliation" or "reprisal" in general, without defining the term (Santa Clara County, Los Angeles County, Los Angeles).

Remedies, however, are scarce. Most provide no relief for the victim of retaliation (Alameda County, Santa Clara County, San Jose, Los Angeles County, San Diego); while just two allow the injured party to file a civil action in court, seeking a small monetary award (Oakland, Los Angeles). Thus, while the coverage of these laws varies, none provides effective relief to the victim of retaliation.

Be that as it may, the standard for San Francisco is set not by other cities or counties, but by its own Charter, which mandates an ordinance protecting its officers and employees from retaliation for whistleblowing. Such protections exist in federal and state government, and there is no reason why they could not exist in San Francisco as well.

8. Role of the Ethics Commission and the Board Of Supervisors

Under the Charter, the Ethics Commission has a duty to make recommendations to the mayor and the Board of Supervisors, concerning revisions to City ordinances related to governmental ethics.[52] Such revisions may be adopted by the Board of Supervisors, or submitted by the Commission directly to the voters at the next general election.[53]

The WPO is one of the governmental ethics laws to which these provisions apply.[54] If, as we have found, the ordinance needs to be strengthened, then the Commission has a duty to consider revising the law, either by recommending changes to the Board of Supervisors or by submitting them to the voters. By the same token, the Board of Supervisors has its own duty to consider changing the law to comply with the City Charter.

Such revisions should include expanding the definition of whistleblowing under the WPO to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and "providing information" to any of the listed recipients, outside of the formal complaint or investigation process. The Charter mandate specifically requires an ordinance protecting these disclosures, but they are not yet covered.

In our view, "protection" for whistleblowers is illusory unless it includes a meaningful remedy for the effects of retaliation. For that reason the Commission and the Board should consider authorizing the Ethics Commission to order cancellation of a retaliatory job action,[55] and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the whistleblower the financial losses that result from such an action.

Finally, the Commission and the Board should consider amending Subsection 4.115(b)(iii) of the WPO to clarify that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.

FINDINGS AND RECOMMENDATIONS

Based on the discussion above we have come to the following conclusions and make

the following recommendations.

Finding 1:

The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.

Recommendation 1.1:

That the Ethics Commission recommend to the Board of Supervisors an amendment to the WPO that provides real protection for whistleblowers, in conformity with the Charter mandate of Proposition C.

Recommendation 1.2:

If the Ethics Commission fails to act, that the Board of Supervisors on its own amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.

Recommendation 1.3:

If the Ethics Commission requests that the Board amend the WPO and the Board fails to act, that the Commission consider submitting such an amendment directly to the voters.

Recommendation 1.4:

If the Ethics Commission and the Board fail to act, that the Mayor introduce legislation to the Board of Supervisors that would amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.

Finding 2:

The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.

Recommendation 2.1:

That amendments to the WPO expand the definition of whistleblowing to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and providing information to any of the recipients listed in the Charter mandate (hereafter "listed recipients"), outside of the formal complaint or investigation process.

Recommendation 2.2:

That these amendments further expand the scope of covered disclosures to include "providing information" to any of the listed recipients regarding improper government activities, whether or not such information is set forth in a formal complaint, or provided during an official investigation.

Finding 3.1:

While other large California cities and counties have relatively weak laws protecting their employees from retaliation for whistleblowing, this does not relieve the Board of its responsibility under the Charter mandate, to enact an ordinance that genuinely protects whistleblowers.

Finding 3.2:

Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.

Recommendation 3:

That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.

Finding 4:

The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.

Recommendation 4:

That amendments to the WPO include a revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.

Request for Responses

Pursuant to Penal Code Sec. 933.05, the civil grand jury requests responses as follows:

From the following individuals:

- Ethics Commission Executive Director: All findings, and Recommendations 1.1, 1.3, 2.1, 2.2, 3, 4

From the following governing bodies:

- Ethics Commission: All Findings, and Recommendations 1.1, 1.3, 2.1, 2.2, 3, 4.
- Board of Supervisors: All Findings, and Recommendations 1.2, 2.1, 2.2, 3, 4.
- Mayor: All Findings, and Recommendations 1.4, 2.1, 2.2, 3, 4

Response Matrix

Findings	*Recommendations*	*Responses Required*
Finding 1: The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.		Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor
	Recommendation 1.1: That the Ethics Commission recommend to the Board of Supervisors an amendment to the WPO that provides real protection for whistleblowers, in conformity with the Charter mandate of Proposition C.	Ethics Commission Executive Director, Ethics Commission
	Recommendation 1.2: If the Ethics Commission fails to act within a reasonable time, that the Board of Supervisors on its own amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.	Board of Supervisors

Findings	Recommendations	Responses Required
	Recommendation 1.3: If the Ethics Commission requests that the Board amend the WPO and the Board fails to act within a reasonable time, that the Commission consider submitting such an amendment directly to the voters. Recommendation 1.4: If the Ethics Commission and the Board fail to act within a reasonable time, that the Mayor introduce legislation to the Board of Supervisors that would amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.	Ethics Commission Executive Director, Ethics Commission Mayor
Finding 2: The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.	Recommendation 2.1: That amendments to the WPO expand the definition of whistleblowing to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and providing information to any of the recipients listed in the Charter mandate (hereafter "listed	Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor

Findings	Recommendations	Responses Required
	recipients"), outside of the formal complaint or investigation process. Recommendation 2.2: That these amendments further expand the scope of covered disclosures to include "providing information" to any of the listed recipients regarding improper government activities, whether or not such information is set forth in a formal complaint, or provided during an official investigation.	
Finding 3.1: While other large California cities and counties have relatively weak laws protecting their employees from retaliation for whistleblowing, this does not relieve the Board of its responsibility under the Charter mandate, to enact an ordinance that genuinely protects whistleblowers. Finding 3.2: Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.	Recommendation 3: That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.	Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor

Findings	*Recommendations*	*Responses Required*
Finding 4: The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.	Recommendation 4: That amendments to the WPO include a revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.	Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor

APPENDIX A: Full Text of SF Campaign & Gov't Conduct Code, Article IV, Chapter 1, Section 4.115 ("Protection for Whistleblowers")

(a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote, suspend or take other similar adverse employment action against any City officer or employee because the officer or employee has in good faith (i) filed a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department, alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest, (ii) filed a complaint with the Controller's Whistleblower Program, or (iii) provided any information or otherwise cooperated with any investigation conducted under this Chapter.

(b) COMPLAINTS OF RETALIATION FOR HAVING FILED A COMPLAINT ALLEGING IMPROPER GOVERNMENT ACTIVITY.

(i) Administrative Complaints. Any city officer or employee, or former city officer or employee, who believes he or she has been the subject of retaliation in violation of Subsection (a) of this Section may file a complaint with the Ethics Commission. The complaint must be filed no later than two years after the date of the alleged retaliation.

The Ethics Commission shall investigate complaints of violations of Subsection (a) of this Section pursuant to the procedures specified in San Francisco Charter Section C3.699-13 and the regulations adopted thereunder.

The Ethics Commission shall investigate complaints of violations of Subsection (a) of this Section pursuant to the procedures specified in San Francisco Charter Section C3.699-13 and the regulations adopted thereunder. The Ethics Commission may decline to investigate complaints alleging violations of Subsection (a) if it determines that the same or similar allegations are pending with or have been finally resolved by another administrative or judicial body. Nothing in this Subsection shall preclude the Ethics Commission from referring any matter to any other City department, commission, board, officer or employee, or to other government agencies for investigation and possible disciplinary or enforcement action. The Ethics Commission may refer matters to the Department of Human Resources with a recommendation. The Ethics Commission may require that any

City department, commission, board, officer or employee report to the Ethics Commission on the referred matter.

(ii) Civil Complaints. Any City officer or employee who believes he or she has been the subject of retaliation in violation of Subsection (a) of this Section may bring a civil action against the City officer or employee who committed the violation. Such action must be filed no later than two years after the date of the retaliation.

(iii) Burden of Establishing Retaliation. In order to establish retaliation under this Section, a complainant must demonstrate by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action. The employer may rebut this claim if it demonstrates by a preponderance of the evidence that it would have taken the same employment action irrespective of the complainant's participation in protected activity.

(c) PENALTIES.

(i) Charter Penalties. Any City officer or employee who violates Subsection (a) of this Section may be subject to administrative penalties pursuant to Charter Section C3.699-13.

(ii) Discipline by Appointing Authority. Any City officer or employee who violates Subsection (a) of this Section shall be subject to disciplinary action up to and including dismissal by his or her appointing authority. If no disciplinary action is taken by the appointing authority, the Ethics Commission may refer the matter to the Civil Service Commission for action pursuant to Charter Section A8.341.

(iii) Civil Penalties. Any City officer or employee who violates Subsection (a) of this Section may be personally liable in a civil action authorized under Subsection (b)(ii) of this Section for a civil penalty not to exceed $5,000.

(d) RESERVATION OF AUTHORITY.

(i) Civil Service Commission. Nothing in this Section shall interfere with the powers granted to the Civil Service Commission by the San Francisco Charter.

(ii) Appointing Authority. Nothing in this Section shall interfere with the power of an appointing officer, manager, or supervisor to take action with respect to any City officer or employee, provided that the appointing officer, manager, or supervisor reasonably believes that such action is justified on facts separate and apart from the fact that the officer or employee filed a complaint with, or cooperated with, an Ethics Commission investigation of such complaint; or filed a complaint with or provided information to the Controller, District Attorney, City Attorney or the complainant's department.

(e) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare, and each City department shall post a notice of whistleblower protections. The notice shall be posted in a location that is conspicuous and accessible to all employees.

APPENDIX B: The WPO Compared With Whistleblower Protection Laws Applicable To Federal, State, And Local Government Employees

The following is a comparison of whistleblower protection laws applicable to federal employees, California state employees, California local agency employees, and California employees in general, with the WPO applicable to employees of the City and county of San Francisco.

A. Who is Covered?

FEDERAL EMPLOYEES: Federal law covers both federal employees and applicants for federal employment. See 5 U.S.C. § 2302(b)(8).

CALIFORNIA STATE EMPLOYEES: California law covers both state employees and applicants for state employment. See Cal. Gov. Code § 8547.8

CALIFORNIA LOCAL AGENCY EMPLOYEES: California law also covers both employees and applicants for "local agency" employment; where a "local agency" means "any county, city, city and county, including any charter county, city, or city and county, and any district, school district, community college district, municipal or public corporation, political subdivision, or public agency of the state, or any instrumentality of any one or more of these agencies." Cal. Gov. Code § 53296; and see Cal. Gov. Code Article 4.5 ("Disclosure of Information: Local Government")

CALIFORNIA EMPLOYEES IN GENERAL: California law further covers employees in general, including "individuals employed by... any county, city, city and county, including any charter city or county, and any school district, community college district... ." *See* Cal. Labor Code § 1102.5(a) ("employees" protected), and § 1106 ("employee" defined). Applicants for employment are also covered. See Cal. Labor Code § 98.6(c)(1).

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: The WPO covers "[a]ny City officer or employee, or former City officer or employee," but does not cover applicants for employment. See WPO, Subsection 4.115(b).

B. Must Covered Disclosures Be Made in a Particular Way?

FEDERAL EMPLOYEES: In the context of federal employment the law covers, without limitation, "any disclosure... if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs... ." 5 U.S.C. § 2302(b)(8)(A). It also separately protects "any disclosure to the Special

Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures... ." 5 U.S.C. § 2302(b)(8)(B).

CALIFORNIA STATE EMPLOYEES: In the context of state employment, the law covers any "good faith communication" without limitation as to its recipient. See Cal. Gov. Code § 8547.2(e).

CALIFORNIA LOCAL AGENCY EMPLOYEES: In the context of local agency employment, the law covers only complaints made in writing to the local agency itself, within 60 days of the date of the act or event which is the subject of the complaint. See Cal. Gov. Code § 53297(a).

CALIFORNIA EMPLOYEES IN GENERAL: In the context of employment in general, state law covers disclosures to a government or law enforcement agency, a person with authority over the employee, or to another employee with authority to investigate, discover, or correct the violation or noncompliance in question. The disclosure may also be made to a public body conducting an investigation, hearing or inquiry. See Cal. Labor Code § 1102.5(a).

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: The WPO covers only disclosures that are made in particular ways. One is by "fil[ing] a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department..."; another, by "filing a complaint with the Controller's Whistleblower Program... ." WPO, Subsection 4.115(a). Also protected are disclosures made while "provid[ing] any information or otherwise cooperat[ing] with an investigation" of such complaints. *Id.* There is no protection for disclosures made by other means, or to other persons or entities; for example, to the news media, or to law enforcement agencies, or to elected officials.

C. What Type of Information Constitutes a Covered Disclosure?

FEDERAL EMPLOYEES: In the context of Federal employment, a covered disclosure is one that the disclosing party "reasonably believes evidences— (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety... ." 5 U.S.C. § 2302(b)(8)(A).

CALIFORNIA STATE EMPLOYEES: In the context of state employment, a covered disclosure is one that "discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition." Cal. Gov. Code § 8547.2(e). In this context, "improper government activity" means "an activity by a state agency or by an employee that is undertaken in the performance of the employee's duties, undertaken inside a state office, or, if undertaken outside a state office by the employee, directly relates to

state government, whether or not that activity is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, (2) is in violation of an Executive order of the Governor, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual, or (3) is economically wasteful, involves gross misconduct, incompetency, or inefficiency." Cal. Gov. Code § 8547.2(c).

CALIFORNIA LOCAL AGENCY EMPLOYEES: In the context of local agency employment, the law covers "the written provision of evidence regarding gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." See Cal. Gov. Code § 53296(c), (d).

CALIFORNIA EMPLOYEES IN GENERAL: Under California law applicable to employees in general, a covered disclosure is one that the employee has "reasonable cause to believe discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." Cal. Labor Code § 1102.5(a). Also protected are disclosures concerning employee safety or health, unsafe working conditions or work practices in the employee's employment or place of employment. See Cal. Labor Code § 6310.

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: Under the WPO, a covered disclosure is one "alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest... ." WPO, Subsection 4.115(a). If made through the Controller's Whistleblower Hotline, the definition of a protected disclosure is somewhat broader: it includes, "the misuse of City funds, improper activities by City officers and employees, deficiencies in the quality and delivery of government services, and wasteful and inefficient City government practices." WPO, Subsection 4.107(a).

D. What Type of Retaliatory Actions are Prohibited?

FEDERAL EMPLOYEES: Federal agencies are prohibited from "taking, failing to take, or threatening to take or fail to take" any of the following personnel actions as a result of a covered disclosure: "(i) an appointment; (ii) a promotion;(iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title; (ix) a

decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions... ." 5 U.S.C. § 2302(a)(2)(A).

CALIFORNIA STATE EMPLOYEES: California state employees are prohibited from taking any of the following actions as a result of a covered disclosure: "promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action." Cal. Gov. C. § 8547.3(b).

CALIFORNIA LOCAL AGENCY EMPLOYEES: California law prohibits local agency officers, managers or supervisors from taking the following actions as a result of a covered disclosure: "any act of intimidation, restraint, coercion, discrimination, or disciplinary action"; where "disciplinary action means any direct form of discipline" including but not limited to "the firing of an employee." See Cal. Gov. Code § 53296(b), (j).

CALIFORNIA EMPLOYEES IN GENERAL: California employers in general are prohibited from taking any of the following actions as a result of a covered disclosure: discharge, threat of discharge, demotion, suspension, retaliation, adverse action, or any other type of discrimination in the terms and conditions of employment. See Cal. Labor Code §§ 98.6(b)(1), 1102.5.

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: City officers or employees may not "terminate, demote, suspend or take other similar adverse employment action" against those who file a covered complaint. See WPO, Subsection 4.115(a). Threats and intimidation are not covered; nor are lesser forms of discipline, or other job actions such as transfer, detail, reassignment, change in duties, adverse performance evaluations or failure to promote.

E. What Enforcement Procedures are Provided?

FEDERAL EMPLOYEES: An injured party has a right to seek administrative relief by filing a complaint with the U.S. Office of Special Counsel, *see* 5 U.S.C. § 1214; and may also file an action before an independent adjudicator known as the U.S. Merit Systems Protection Board. See 5 U.S.C. §§ 1214(a)(3), 1221.

CALIFORNIA STATE EMPLOYEES: An injured party has a right to seek administrative relief by filing a written complaint with the State Personnel Board,

see Cal Gov. Code § 19683(a); and may also file a civil action in court. See Cal. Gov. Code § 8547.3(c).

CALIFORNIA LOCAL AGENCY EMPLOYEES: An injured party has no right to seek administrative relief. He or she may file a civil action in court against the alleged retaliator, if and when the latter has been convicted in court of criminal retaliation "with malicious intent.... ." See Cal. Gov. Code § 53298.5(b).

CALIFORNIA EMPLOYEES IN GENERAL: An injured party has a right to seek administrative relief by filing a complaint with the Labor Commissioner, *see* Cal. Labor Code §§ 98.7, 1102.5; and may also file a civil action in court, regardless of whether he or she first seeks relief from the Labor Commissioner. See Cal. Labor Code §§ 1102.5; 98.7(f), (g); 244(a).

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: An injured party has a right to file an administrative complaint of retaliation with the Ethics Commission, and may also file a civil action in court against the alleged retaliator. See WPO, Subsection 4.115(b), (c); Charter, Sec. C3.699-13.

F. What Remedy is Provided?

FEDERAL EMPLOYEES: The injured party may obtain an order requiring that he or she be placed, as nearly as possible, in the position that he or she would have occupied had the retaliation not occurred; plus back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, compensatory damages (including interest, reasonable expert witness fees, and costs), and attorney's fees and costs. See 5 U.S.C. §§ 1214(g), 1221(g)(1).

CALIFORNIA STATE EMPLOYEES: Before the State Personnel Board, the injured party may obtain "appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of the state employee or applicant for state employment who was the subject of the alleged acts of misconduct.... ." Cal Gov. Code § 19683(c). In court, the injured party may recover money damages, including punitive damages "where the acts of the offending party are proven to be malicious," as well as "reasonable attorney's fees.... ." Cal. Gov. Code § 8547.8(c).

CALIFORNIA LOCAL AGENCY EMPLOYEES: In court, the injured party may recover money damages, including punitive damages, as well as "reasonable attorney's fees as provided by law." Cal. Gov. Code § 53298.5(b).

CALIFORNIA EMPLOYEES IN GENERAL: Either before the Labor Commissioner or in court, the injured party many obtain "reinstatement and reimbursement for lost wages and work benefits caused by" the employer's retaliatory actions. See Cal. Labor Code §§ 98.6(b), (c); *id.*, § 1102.5. In addition, the employer may be liable for a civil penalty up to $10,000 per employee for each violation. *Id.* § 98.6(b)(3). The

injured party may also recover attorney fees pursuant to California Code of Civil Procedure § 1021.5.

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: The WPO does not provide any direct relief to the injured party, and makes no provision for attorney fees. If the injured party files a civil action, it limits his or her recovery to "a civil penalty not to exceed $5,000." WPO, Subsection 4.115(c)(3). No other money damages may be recovered, either from the person who took the reprisal in question, or from the City and County. See *id.*, Sec. 4.135.

APPENDIX C: Comparison of Selected City And County Whistleblower Protection Ordinances and Policies

The following is a comparison of local whistleblower protection laws currently in effect in selected major cities and counties elsewhere in California.

A. Who is covered?

ALAMEDA COUNTY. Both county employees and applicants for county employment are covered. See Alameda County Admin. Code, Chapter 32 ("Protection of Employees Disciplined For Disclosing Information"), Sec. 3.52.030

OAKLAND: Only city officers or employees are covered. See Oakland Muni. Code 2.38.020

SANTA CLARA COUNTY: "Any person" is covered, without regard to employment status. See Santa Clara County Code, Sec. A25-751, A25-753

SAN JOSE: The policy covers "applicants, officers, officials, employees, or contractors" who work for the city. See City of San Jose Non-Retaliation Policy, City Administrative Policy Manual, Sec. 1.1.4 (hereafter "SJ Policy")

LOS ANGELES COUNTY: Any "person" is covered. County officers and employees are also expressly covered. See Los Angeles County Code Sections 5.02.060A, 5.02.060B

LOS ANGELES CITY: Any "person" is covered, without regard to employment status. See Los Angeles Municipal Code, Chapter IV, Article 9.5 ("Municipal Ethics and Conflicts of Interest"), Sec. 49.5.4 ("Protection Against Retaliation")

SAN DIEGO CITY: "[A]ny person" is covered, without regard to employment status. See San Diego Muni. Code, Article 6, Division 4 ("Ethics Commission"), Sec. 26.0415.

B. Must covered disclosures be made in a particular way?

ALAMEDA COUNTY: The ordinance covers "any written document containing a disclosure" of protected information, regardless of its recipient. See Alameda County Admin. Code, Sec. 3.52.020

OAKLAND: The ordinance covers any type of communication that "reports or otherwise brings to the attention of the City Auditor" any protected information. See Oakland Muni. Code 2.38.020

SANTA CLARA COUNTY: The ordinance covers only reports to the Office of the County Counsel, unless a report concerns activities within that Office, in which case

it should be made with the Office of the County Executive. See Santa Clara County Code, Sec. A25-751, A25-753

SAN JOSE: The policy covers "1. Making or filing an internal complaint with the City ... 2. Providing informal notice to the City... 3. Participation in investigations and in court/administrative hearings... 4. Filing a complaint with a Federal or State enforcement or administrative agency 5. Disclosing information to a government or law enforcement agency ... 6. Participating in or cooperating with a Federal or State enforcement agency that is conducting an investigation of the City ... 7. Reporting... 8. Calling an internal or outside governmental agency's 'Whistleblower hotline' 9. Associating with another employee who is engaged in any of the protected activities enumerated here" SJ Policy, "Definitions", I. ("Protected activity" defined).

LOS ANGELES COUNTY: The ordinance covers any type of communication that "reports or otherwise brings to the attention of the auditor-controller or other appropriate agency, office or department of the county of Los Angeles" certain covered information. See Los Angeles County Code Sections 5.02.060A, 5.02.060B

LOS ANGELES CITY. The ordinance covers any type of communication that "reports" covered information "to the Ethics Commission or another governmental entity." See Los Angeles Municipal Code Sec. 49.5.4B.

SAN DIEGO CITY: The ordinance covers "mak[ing] a complaint or provid[ing] information to the [Ethics] Commission." See San Diego Muni. Code Sec. 26.0415.

C. What type of information constitutes a covered disclosure?

ALAMEDA COUNTY: The ordinance covers disclosures "regarding gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Alameda County Admin. Code, Sec. 3.52.020

OAKLAND: The ordinance covers disclosures of "information which, if true, would constitute one of the following: a work-related violation by a City officer or employee of any law or regulation; fraud, waste or mismanagement of City assets or resources; gross abuse of authority; a specific and substantial danger to public health or safety due to an act or omission of a City official or employee; or use of a City office, position or resources for personal gain." Oakland Muni. Code 2.38.020

SANTA CLARA COUNTY: The ordinance covers disclosure of "information that a County officer or employee has engaged in improper governmental activity in violation of state or federal law, County ordinance or administrative memoranda. Examples of such improper conduct include but are not limited to: violating local campaign finance laws, conflict of interest laws, or governmental ethics; misusing County resources; or using a County position to advance a private interest." Santa Clara County Code, Sec. A25-751

SAN JOSE: The policy covers disclosures "regarding alleged violations of City policy, local, State or Federal law... violation of State or Federal statute, or a violation or noncompliance with a State or Federal rule or regulation... unlawful activity... conflicts of interest, dishonesty or unethical conduct... ." San Jose Policy, "Definitions", I. ("Protected activity" defined).

LOS ANGELES COUNTY: The ordinance covers disclosure of "information which, if true, would constitute: a work-related violation by a county officer or employee of any law or regulation; gross waste of county funds; gross abuse of authority; a specific and substantial danger to public health or safety due to an act or omission of a county official or employee; use of a county office or position or of county resources for personal gain; or a conflict of interest of a county officer or employee." LA County Code Sec. 5.02.060A

LOS ANGELES CITY. The ordinance covers disclosures of "a possible violation of law... ." Los Angeles Municipal Code Sec. 49.5.4B.

SAN DIEGO CITY: The anti-retaliation provision applies to "complainants and witnesses" who "make a complaint or provide information to the Commission." San Diego Muni. Code Sec. 26.0415. The ordinance defines a "complainant" is one who "makes a complaint alleging violations of governmental ethics laws"; meaning, "local laws governing campaign contribution limits, campaign contribution disclosure, campaign expenditure disclosure, statements of economic interests, receipt and disclosure of gifts, conflicts of interest, lobbying registration and disclosure... ." *Id.*, Sec. 26.402.

D. What type of retaliatory actions are prohibited?

ALAMEDA COUNTY: The ordinance prohibits county officers, managers or supervisors from taking "any disciplinary action or disciplinary transfer against any employee, or any other act of intimidation, restraint, coercion or discrimination against any employee or applicant for employment in retaliation for a disclosure of information by the employee." See Alameda County Admin. Code Sec. 3.52.020, 3.52.040(A)

OAKLAND: The ordinance prohibits retaliation by taking or threatening "any adverse employment action, including discharge, discipline or demotion"; where "adverse employment action" is further defined as one that "had a detrimental and substantial effect on the terms, conditions, or privilege of a complainant's employment or required the complainant to work in a discriminatorily hostile or abusive work environment. A change that is merely contrary to a complainant's interests or liking is insufficient." See Oakland Muni. Code Sec. 2.38.040, 2.38.060, 2.38.070

SANTA CLARA COUNTY: The ordinance prohibits "[A]ny retaliation or reprisal by any County officer or employee against any complainant or informant" without limitation as to the type of action prohibited. See Santa Clara County Code, Sec. A25-753.

SAN JOSE: The policy prohibits the use, or attempted use of official authority "for the purpose of intimidating, threatening, coercing, directing or influencing any person with the intent of interfering with that person's duty" to disclose official wrongdoing. It further prohibits retaliation by "adverse employment action" which "may include, but is not limited to, any of the following: 1. Real or implied threats of intimidation to attempt or prevent an individual from reporting alleged wrongdoing or because of protected activity 2. Denying promotion to an individual because of protected activity 3. Taking any form of disciplinary action because of protected activity 4. Extending a probationary period because of protected activity 5. Altering work schedules or work assignments because of protected activity". SJ Policy, "Policy", "Definitions" ("Adverse Employment Action" defined).

LOS ANGELES COUNTY: The ordinance prohibits county officers or employees from using or threatening to use their official authority or influence either "to restrain or prevent any other person" from making a protected disclosure, or to take "any action as a reprisal against a county officer or employee... ." LA County Code Sections 5.02.060A, 5.02.060B

LOS ANGELES CITY. The ordinance prohibits threatening or effecting "any action as a reprisal... ." Los Angeles Municipal Code Sec. 49.5.4B.

SAN DIEGO CITY: The ordinance prohibits the use or threatened use of "any official authority, including discipline or termination, to discourage, restrain or interfere" with a complainant or witness before the Ethics Commission. San Diego Muni. Code Sec. 26.0415.

E. What enforcement procedures are provided?

ALAMEDA COUNTY: An injured party has a right to file an administrative claim of reprisal, which is investigated by the county administrator and the appropriate appointing authority, and ultimately referred to the Board of Supervisors for determination. See Alameda County Admin. Code Sec. 3.52.030.

OAKLAND: An injured party has a right to file an administrative complaint of retaliation with the City Auditor, and may also file a civil action in court against the alleged retaliator. See Oakland Muni. Code 2.38.050, 2.38.110.

SANTA CLARA COUNTY: The ordinance provides no right to file a complaint of retaliation, either administratively or in court. See Santa Clara County Code, Sec. A25.

SAN JOSE: An injured party "should immediately report the conduct to the applicable Department Director or to the City Manager's Office of Employee Relations." SJ Policy, "Complaint Procedures"

LOS ANGELES COUNTY: An injured party "may file a complaint with the director of personnel" who "shall investigate the complaint and thereafter prepare a report thereon which shall be forwarded to the board of supervisors." LA County Code Sec. 5.02.060C

LOS ANGELES CITY. An injured party has a right to file an administrative complaint of retaliation with the Ethics Commission. A civil action may also be filed in court against the alleged retaliator, either by the injured party – provided he or she is a resident of the City – or by the City Attorney or the Ethics Commission. See Los Angeles Municipal Code Sec. 49.5.4B, 49.5.16B.

SAN DIEGO CITY: The ordinance does not provide any procedure for enforcing its anti-retaliation provision. San Diego Muni. Code Sec. 26.0415.

F. What remedy is provided?

ALAMEDA COUNTY: The ordinance provides no remedy to the injured party, but merely restates the relief available to local agency complainants under state law; i.e., the right to file an action for money damages in court, if and when the accused has been convicted of criminal retaliation. See Alameda County Admin. Code Sec. 3.52.050; Cal. Gov. C. Sect. 53298.5(b).

OAKLAND: The ordinance provides no direct relief to the injured party, and makes no provision for attorney fees. If an injured party files an action in court, it limits his or her recovery to a civil penalty not to exceed $5,000. See Oakland Muni. Code 2.38.050, 2.38.110.

SANTA CLARA COUNTY: The ordinance provides no relief to the injured party. See Santa Clara County Code, Sec. A25.

SAN JOSE: The policy provides no relief to the injured party. See San Jose Policy.

LOS ANGELES COUNTY: The ordinance provides no relief to the injured party. See Los Angeles County Code Sec. 5.02.060

LOS ANGELES CITY. The ordinance provides no administrative relief to the injured party. If an injured party who is a resident of the City files an action in court, or if the City Attorney or Ethics Commission does so on the injured party's behalf, the injured party's recovery is limited to 50 percent of "an amount not more than... $5,000 per violation..."; the remaining 50 percent to be paid to the City. The court may also order injunctive relief. An injured party who prevails in court may also be awarded "that party's costs of litigation, including reasonable attorney fees." See Los Angeles Municipal Code Sec. 49.5.16B.

SAN DIEGO CITY: The ordinance does not provide any remedy for retaliation against complainants or witnesses. San Diego Muni. Code Sec. 26.0415.

APPENDIX D: Controller's Notice Of Whistleblower Protections

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller

Monique Zmuda
Deputy Controller

Whistleblower Program – Protection from Retaliation

PROTECTION OF WHISTLEBLOWERS – RETALIATION PROHIBITED

Who is protected from retaliation?

Any current or former City officer or employee who believes s/he has been the subject of retaliation in violation of Article IV of the San Francisco Campaign and Governmental Conduct Code (Code) may file a complaint with the Ethics Commission, which shall investigate or refer the complaint.

What is "retaliation" under the Code?

The Code defines retaliation is the "termination, demotion, suspension, or other similar adverse employment action" taken against any city officer or employee for having participated in good faith in any of the following protected activities:

- Filing a complaint with the Ethics Commission, Controller, District Attorney, or City Attorney, or filing a written complaint with the complainant's department, alleging that a city officer or employee engaged in *improper governmental activity*.
- Filing a complaint with the Controller's Whistleblower Program.
- Cooperating with an investigation of a complaint conducted under the Code.

"Improper government activity" includes the following:

- Violating local campaign finance, lobbying, conflict of interests, or governmental ethics laws, regulations, or rules.
- Violating the California Penal Code by misusing city resources.
- Creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's city position.
- Abusing his or her city position to advance a private interest.

What protections are provided to a whistleblower?

You are protected from adverse employment action if you filed a complaint as defined above or cooperated with an investigation of a complaint under the Code.

What should I do if I believe I have been subject to retaliation?

If you believe you have suffered an adverse employment action because of a complaint you filed as listed in Code Section 4.115(a) or because of your cooperation with an investigation under the Code, you must file a complaint with the Ethics Commission within two years after the date of the alleged retaliation. (Code Section 4.115(b)(1))

How do I report that I have been retaliated against?

It is strongly recommended that you speak with an Ethics Commission investigator to determine whether the matter about which you are complaining is within the Ethics Commission's jurisdiction. If it is not within the Ethics Commission's jurisdiction, staff will refer you to the most appropriate agency.

To speak with an investigator, please call the Ethics Commission at (415) 252-3100.

More information regarding filing a complaint with the Ethics Commission may be found at: http://www.sfethics.org/ethics/2009/05/complaints.html#ii

415-554-7500 City Hall • 1 Dr. Carlton B. Goodlett Place • Room 316 • San Francisco CA 94102-4694 FAX 415-554-7466

Endnotes

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[1] 2013-14 San Francisco Civil Grand Jury, *Ethics in the City: Promise, Practice or Pretense* (July 2014), p. 13.
[2] San Francisco Campaign & Gov't Conduct Code, Article IV, Chapter 1, Sec. 4.100, *et seq* (rev. 2008) (hereafter "Whistleblower Protection Ordinance" or "WPO").
[3] *Id.*, Subsection 4.115(a).
[4] San Francisco Administrative Code (hereafter "Admin. Code") §§ 16.400 through 16.404. See Ordinance 124-89, Approved 4/26/1989.
[5] Admin. Code §§ 16.400, 16.401.
[6] The Improper Government Activities Ordinance forbade City officers or employees to retaliate by "promising to confer or not to confer, or conferring or not conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, or approving any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action...." *Id.*, Subsection 16.402(b).
[7] *Id.*, Sec. 16.402.
[8] San Francisco Charter (hereafter "Charter"), Appendix C, Sec. C3.699-11, item 7.
[9] See Ordinance 71-00, Approved 4/28/2000, at p. 151ff.
[10] See WPO, Sec. 4.105 (2000).
[11] Under the new law, City officers or employees were forbidden to intimidate, threaten, coerce, or interfere with any individual because that individual had filed such a complaint, or cooperated in its investigation. They were also forbidden to discipline or otherwise retaliate against any City officer, employee or applicant for City employment for the same reason. See *id.*, Subsection 4.115(a) (2000).
[12] *Id.*, Sec. 4.105 (2000).
[13] See Ordinance 29-02, Approved 3/15/2002.
[14] See WPO, Subsection 4.115(a) (rev. 2002).
[15] To qualify for protection, a disclosure had to charge a City officer or employee with violating local laws regulating campaign finance, lobbying, conflicts of interest or governmental ethics, violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest. Whistleblowers were also protected if they cooperated in the investigation of such a complaint. *Id.*
[16] Specifically, it granted the Controller "authority to receive individual complaints concerning the quality and delivery of government services, wasteful and inefficient City government practices, misuse of City government funds, and improper activities by City government officers and employees." Charter, Appendix F, Subsection F1.107(a).
[17] *Id.*, Subsection F1.107(c).
[18] In 2008 the Board of Supervisors passed an ordinance expanding the list of complaints covered under the anti-retaliation provision to include those filed with the Controller's Whistleblower Program. Otherwise, it made no substantive changes to the anti-retaliation provisions. See Ordinance No. 205-08, approved 9/19/08; WPO, Subsection 4.115(b) (2008).
[19] *Id.*, Sec. 4.107.
[20] See *Whistling in the Dark: The San Francisco Whistleblower Program*, 2010-2011 San Francisco Civil Grand Jury.
[21] See *id.*, Subsection 4.115(b); Charter, Section C3.699-13.
[22] See "Ethics Commission Regulations For Investigations And Enforcement Proceedings" effective July 5, 1997; as amended through March 29, 2013.
[23] *Id.*, Sec. IV.C
[24] *Id.*, Sec. VII. If Commission staff concludes that probable cause does not exist they must notify the Commission of that fact, and the Commission remains free to consider the matter on the motion of any one of its members. *Id.*, Sec. VI.A.

[25] *Id.*, Sec. II.L.
[26] *Id.*, Sec. VIII.A.4.
[27] *Id.*, Sec. IX.
[28] See the Commission's "Enforcement Summaries" at *http://www.sfethics.org/ethics/2009/05/enforcement.html*, (complaints resolved 11/14/2011 and 7/23/2012).
[29] See WPO, Subsection 4.115(a). Also protected are disclosures made while providing any information or otherwise cooperating with an investigation of such complaints. *Id.*
[30] *Id.*, Subsection 4.115(a). If disclosures are made through the Controller's Whistleblower Hotline, the definition of a protected disclosure is somewhat more inclusive. It covers disclosures concerning "misuse of City funds, improper activities by City officers and employees, deficiencies in the quality and delivery of government services, and wasteful and inefficient City government practices." *Id.*, Subsection 4.107(a).
[31] *See id.*, Subsection 4.115(a).
[32] 2013-14 San Francisco Civil Grand Jury, *Ethics in the City: Promise, Practice or Pretense* (July 2014), p. 13.
[33] *See* WPO, Subsection 4.115(b).
[34] See Cal. Evid. Code Sec. 115; Witkin, *California Evidence* (5th Ed., 2012), at 175.
[35] Charter, Sec. C3.699-13.
[36] See WPO, Subsection 4.115(b)(i).
[37] See Witkin, *California Evidence* (5th Ed., 2012) at 207-08.
[38] See "CPI Inflation Calculator," published by United States Department of Labor, Bureau of Labor Statistics, on its web site at http://www.bls.gov/data/inflation_calculator.htm
[39] Cal. Labor Code § 1102.5 and sections that follow.
[40] See Cal. Labor Code §§ 98.6(b)(1), 1102.5. See also Cal. Government Code § 53296 (additional protections, applicable only to local agency employees).
[41] Under some labor contracts minor grievances are handled at the departmental level. These were not included in the search.
[42] See Charter, Appendix F, Subsection F1.107(c).
[43] See Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/protect
[44] See WPO, Subsection 4.115(e).
[45] See Charter, Appendix C, Subsection C3.699-13(a).
[46] California Government Code § 53296 was enacted in 1986, and last amended in 1994. California Labor Code § 1102.5 was enacted in 1937, and while additional protections were added in 2014, its former provisions were substantially as described above.
[47] Charter, Sec. F1.107(c)
[48] Charter, Appendix F, Sec. F1.107(c)
[49] See WPO, Subsection 4.115(a)
[50] See 5 U.S.C. §§ 1214, 1221, 2302; Cal. Gov. C. §§ 8547.2, 8547.3, 8547.8, 19683(a)
[51] See Los Angeles Municipal Code Sec. 49.5.4, 49.5.16B; San Diego Muni. Code Sec. 26.402, 26.0415, 26.0421, 26.0439; San Jose City Policy Manual, Sec. 1.1.4; Oakland Muni. Code Sec. 2.38.020 - 2.38.020, 2.38.110; Santa Clara County Code Sec. A25-751, A25-753; Alameda County Admin. Code Sec. 3.52.020 - 3.52.050; Los Angeles County Code Sec. 5.02.060 Neither Sacramento nor Fresno has an ethics commission or its equivalent, or any whistleblower protection ordinance or policy that the Jury could discern.
[52] See Charter, Sec. C3.699-11, item 6.
[53] See *id.*, Sec. 15.102.
[54] See "Ethics Commission Regulations For Investigations And Enforcement Proceedings", at p. 2 ("violation of law" defined).
[55] We suggest a two-step process. If, after a public hearing, the Commission finds that retaliation has occurred, it would issue a "cease and desist" order requiring the agency or department that took the action to retroactively cancel it, expunge personnel records related to the action, and restore any

back pay, service credit or other benefits that were lost as a consequence. Such orders are authorized under Charter Section C3.699(c)(i). At the same time, the Commission would provide the employing agency with an opportunity to nullify this order, by showing that the acting official reasonably believed that the action was justified, based on facts separate and apart from the complainant's whistleblowing. This would respect the "reservation of authority" set forth at Subsection 4.115(d)(ii) of the WPO.

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

PAUL. A. RENNE
CHAIRPERSON

BRETT ANDREWS
VICE-CHAIRPERSON

BEVERLY HAYON
COMMISSIONER

BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: June 23, 2015

To: Members, Ethics Commission

From: John St. Croix, Executive Director

Re: **Hearing – Ethics Complaint 10-150331**

This matter was referred to the Ethics Commission from the Sunshine Ordinance Task Force on March 31, 2015, and will be heard under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance ("Regulations"). Staff has scheduled this matter to be heard during the Ethics Commission special meeting at **5:30 PM on Monday, June 29, 2015**, in **Room 400** in City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

The Complainant was notified of the referral on April 6, 2015, and the Respondent was notified of the referral on April 17, 2015. Both the Complainant and Respondent were notified of the hearing and were issued the Report and Recommendation on June 1, 2015. Due to a scheduling change of the Ethics Commission's meeting from June 22 to June 29, 2015, both the Complainant and the Respondent were notified of the new hearing date on June 10, 2015. The Sunshine Ordinance Task Force was issued a courtesy copy of the Report and Recommendation, and were notified of the hearing date. Neither the Complainant nor the Respondent submitted a request for a continuance or a response to the Report and Recommendation.

Neither the Complainant nor the Respondent are required to attend the hearing. However, if any party fails to appear, and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence. The Complainant and the Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. Formal rules of evidence shall not apply to the hearing.

In determining whether a violation occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance.

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ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

PAUL A. RENNE
CHAIRPERSON

BRETT ANDREWS
VICE-CHAIRPERSON

BEVERLY HAYON
COMMISSIONER

BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: June 1, 2015

To: Phil Ginsburg, General Manager, Recreation and Parks Department, Respondent
Dominic Maionchi, Complainant

Cc: Members, Sunshine Ordinance Task Force

From: John St. Croix, Executive Director

Re: **NOTICE – Hearing – Ethics Complaint 10-150331**

The above referenced complaint will be heard under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance ("Regulations"). Staff has scheduled this matter to be heard during the next regular Ethics Commission meeting at **5:30 PM on Monday, June 22, 2015**, in Room 400 in City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

Neither the Complainant nor the Respondent are required to attend. However, if any party fails to appear, and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence. The Complainant or the Respondent must request any continuance of the hearing date in writing. The request must be delivered to the Commission Chairperson, and to all other parties, no later than ten business days before the date of the hearing, or no later than Monday, June 8, 2015.

Under Chapter Three of the Regulations, the Executive Director shall prepare a written Report and Recommendation summarizing his or her factual and legal findings. The Report and Recommendation and all accompanying documents are enclosed.

The Complainant and Respondent may each submit a written response to the Director's Report and Recommendation. The response may contain legal arguments, a summary of evidence, and any mitigating or aggravating information. In support of the response, the Complainant and Respondent may each submit evidence through declaration. If the Complainant or Respondent submits a response, he or she must deliver the response to the Commission, and to all other parties, no later than five business days prior to the date of the hearing, or no later than Monday, June 15, 2015. Any response may not exceed 10 pages, double-spaced, excluding attachments. The Complainant or

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Respondent must deliver eight copies of the response, or may send the response as an email attachment, to the Executive Director.

The Complainant and the Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing.

In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance.

ETHICS COMMISSION
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COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
ECUTIVE DIRECTOR

Date: June 1, 2015

To: Members, Ethics Commission

Cc: Phil Ginsburg, General Manager, Recreation and Parks Department, Respondent
Dominic Maionchi, Complainant
Members, Sunshine Ordinance Task Force

From: John St. Croix, Executive Director

Re: **REPORT AND RECOMMENDATION**
ETHICS COMMISSION COMPLAINT NO. 10-150331

INTRODUCTION AND JURISDICTION

This report and recommendation has been prepared pursuant to Chapter Three of the Ethics Commission's Regulations for Handling Violations of the Sunshine Ordinance ("Regulations") with regard to a referral from the Sunshine Ordinance Task Force ("Task Force"), alleging a violation of the Sunshine Ordinance ("Ordinance") by Recreation and Parks Department General Manager, Phil Ginsburg.

More specifically, the Task Force alleges that Mr. Ginsburg violated Ordinance, section 67.26, by redacting certain address information from requested wait lists, and that the violation was willful pursuant to Ordinance, section 67.34.

The Regulations indicate that the Commission shall handle complaints alleging violations of the Sunshine Ordinance by an elected official or department head. (Regulations, Chapter 3, Section I.A., copy attached.) The allegations discussed herein

involve a department head. Under the Regulations, the Commission must make a determination on alleged violations of the Ordinance that it will consider at a hearing in open session. The Commission is not bound by the Executive Director's recommendations contained herein.

PROCEDURAL BACKGROUND

This matter concerns an allegation that the Recreation and Parks Department improperly redacted address information from a requested wait list. It returns to the Commission just over a year after the Commission first considered it.

The matter was originally heard by the Task Force in May 2013. The Task Force determined that the Department committed a violation of Ordinance, section 67.26, by redacting the requested records, and ordered that the information be released. The department did not comply with the order maintaining that the information was properly redacted, and the Task Force eventually referred the matter to the Ethics Commission on March 3, 2014.

Staff conducted an investigation and issued a Report and Recommendation on April 4, 2014. Staff's investigation concluded that Mr. Ginsburg had not been named as a respondent when the Task Force made its finding at the hearing on the matter in May 2013, and that no evidence had been presented to the Task Force during its hearing process to demonstrate that Mr. Ginsburg was involved with the records request. Staff also determined that redacting the home addresses and phone numbers of private individuals was not contrary to the Ordinance pursuant to Administrative Code, section 12.M.2 and the balancing required by the state's constitutional right to privacy. (See staff's original April 2014 report, attached as Exhibit A.)

On April 28, 2014, the Ethics Commission held a hearing on the matter. At the hearing the Ethics Commission adopted a motion to refer the complaint back to the Task Force for "further factual information" because the Ethics Commission could not determine whether Phil

Ginsburg was the properly named respondent. The matter was referred back to the Task Force on May 2, 2014.

On March 30, 2015, the Task Force referred the matter back to the Ethics Commission. The Task Force did not conduct any additional fact-finding to determine Mr. Ginsburg's involvement with the records request, but maintained that as the department head, he may be held responsible for the actions of the Department. However, the Task Force did hold several meetings on the matter, and included "Findings" with the referral letter that summarizes the factual and legal basis for its original determination in 2013. (See Exhibit B.) Also, during that process the Office of the City Attorney issued a memorandum providing guidance on the central legal question regarding the propriety of the redactions. (See Exhibit C.) The Task Force and the City Attorney's Office reached different legal conclusions.

Although the Task Force did not conduct any additional fact-finding, staff believes that the Commission should hear this matter for two reasons. First, pursuant to the policy adopted by the Commission on December 16, 2015 (attached as Exhibit D), "the Commission will consider at its hearing the violations and respondents indicated in a Task Force referral letter without reference to the Task Force's proceedings so long as the referral letter states that the named respondents were given notice and an opportunity to respond during the Task Force's proceedings with respect to all of the allegations in the referral letter." The referral letter in this case largely complies with this requirement. Second, it is clear that Mr. Ginsburg has been aware of this matter by virtue of the Commission's prior consideration.

SUMMARY OF RELEVANT LAW

1. Ordinance, section 67.24. Ordinance, section 67.24(i), prohibits City agencies from asserting "an exemption for withholding for any document or information based on a finding or

showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of [the Ordinance] providing for withholding of the specific type of information in question or on an express and specific exemption provided by [the PRA] that is not forbidden by [the Ordinance]."

2. Ordinance, section 67.26. Ordinance, section 67.26, provides, in relevant part, that no "record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute. Information that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of this article."

3. Ordinance, section 67.34. Ordinance, section 67.34, states that the "willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission."

4. Administrative Code, section 12.M.2. San Francisco Administrative Code, section 12.M.2(a), states that "[t]he City shall not disclose Private Information to any person or entity

unless specifically authorized to do so by the subject individual or by Contract or where required by Federal or State law or judicial order."[1]

5. Constitutional right to privacy. Privacy is a constitutional right in California that is recognized in the California Public Records Act ("PRA"). (Cal. Const., Art. 1, § 1; PRA, § 6250.)

6. Commission policy. Pursuant to Commission policy, when asked to determine whether a City department head committed a willful violation of the Sunshine Ordinance, will be to consider the department head's actual involvement in the records request or other matter, as well as any other relevant factors. And if warranted, the Commission may determine that a City department, instead of a City officer or employee, committed a non-willful violation of the Sunshine Ordinance.

EVIDENCE CONSIDERED AND FACTUAL FINDINGS

Because no additional fact-finding occurred at the Task Force, and because there is no dispute as to the underlying facts, staff conducted no additional interviews. Staff submits the March 30, 2015, Task Force referral letter and "Findings" which provide a factual summary and analysis on the Task Force's determination. (Exhibit B.)

LEGAL FINDINGS

Staff finds persuasive the memorandum from the City Attorney to the Task Force, dated September 14, 2014, addressing the fundamental legal issue regarding this matter, and which is consistent with staff's prior recommendation that the redactions were likely permissible. Thus, staff directs the Commission to that memorandum, attached as Exhibit C, for its legal findings.

[1] "Private Information" means "any information that (1) could be used to identify an individual, including without limitation name, address, social security number, medical information, financial information, date and location of birth, and names of relative; or (2) the law forbids any person from disclosing." (S.F. Admin. Code, § 12.M.1(e).)

RECOMMENDATION

Based on the above reasons, staff recommends that the Commission find that Mr. Ginsburg and the Department did not commit a violation of Ordinance, section 67.26.

San Francisco
Ethics Commission

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ETHICS COMMISSION REGULATIONS FOR HANDLING VIOLATIONS OF THE SUNSHINE ORDINANCE

Effective Date: January 25, 2013
Includes amendments effective November 22, 2013

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CHAPTER ONE

I. PREAMBLE

Pursuant to San Francisco Charter, section 15.102, the San Francisco Ethics Commission promulgates these Regulations in order to ensure compliance with the San Francisco Sunshine Ordinance, San Francisco Administration Code, section 67.1, et seq. These Regulations shall apply to complaints alleging violations of the Sunshine Ordinance. All complaints alleging violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other governmental ethics laws shall be handled separately under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

A. "Brown Act" means California Government Code section 54950, et seq.

B. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.

C. "California Public Records Act" means California Government Code section 6250, et seq.

D. "City" means the City and County of San Francisco.

E. "City officer" means any officer identified in San Francisco Administrative Code Section 1.50, as well as any City body composed entirely of such officers.

F. "Commission" means the Ethics Commission.

G. "Complaint" means a Task Force referral or a referral from the Supervisor of Records, a written document submitted directly to the Ethics Commission alleging a violation of the Sunshine Ordinance, or a matter initiated by Ethics Commission staff alleging a violation of the Sunshine Ordinance.

H. "Complainant" means a person or entity that initiated a matter with the Task Force, Supervisor of Records, or Commission alleging a violation of the Sunshine Ordinance. "Complainant" shall also mean the Commission if the matter was initiated by Commission staff.

I. "Custodian" means a City officer or employee having custody of any public record.

J. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.

K. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity. The Commission, the Executive Director, the Task Force, a Respondent, or the Complainant receiving material may consent to any other means of delivery, including delivery by e-mail or fax. In any proceeding, the Commission Chairperson may order that the delivery of briefs or other materials be accomplished by e-mail.

L. "Elected official" shall mean the Mayor, a Member of the Board of Supervisors, City Attorney, District Attorney, Treasurer, Sheriff, Assessor, Public Defender, a Member of the Board of Education of the San Francisco Unified School District, and a Member of the Governing Board of the San Francisco Community College District.

M. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.

N. "Exculpatory information" means information tending to show that the Respondent has not committed the alleged violation(s).

O. "Order of Determination" means: 1) an order from the Task Force that forms the basis of a show cause hearing for Task Force referrals made under Sunshine Ordinance section 67.30(c); or 2) a final recommendation issued by the Task Force, made pursuant to Sunshine Ordinance section 67.34, that a willful violation of the Sunshine Ordinance by an elected official or department head occurred.

P. "Public Records" means records as defined in section 6252(e) of the California Public Records Act, which includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics, and/or Sunshine Ordinance section 67.20(b).

Q. "Referral" means a document from the Task Force or Supervisor of Records to the Commission finding a violation of the Sunshine Ordinance.

R. "Respondent" means a City officer or City employee who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance.

S. "Sunshine Ordinance" means San Francisco Administrative Code section 67.1, et seq.

T. "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30.

U. "Willful violation" means an action or failure to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance.

CHAPTER TWO

I. REFERRALS TO THE ETHICS COMMISSION

A. Matters to be heard in a Show Cause Hearing.

1. Under this Chapter, the Ethics Commission will conduct a Show Cause Hearing on any referral, as defined by these Regulations, finding:

a. willful violations of the Sunshine Ordinance by City officers and employees (other than elected officials or department heads), or

b. non-willful violations of the Sunshine Ordinance by elected officials, department heads, or City officers and employees.

2. Complaints alleging willful violations of the Sunshine Ordinance against elected officials and department heads shall be handled pursuant to Chapter Three of these regulations.

B. Scheduling of Show Cause Hearing.

1. After receipt of a referral, the Commission shall schedule a Show Cause Hearing on the matter at the next regular Ethics Commission meeting, provided that the Show Cause Hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.

2. In the event that four or more Commissioners will not be present at the scheduled Show Cause Hearing, the Commission may reschedule or continue to the next practicable regular Ethics Commission meeting.

II. SHOW CAUSE HEARING

A. Public Hearing. The Show Cause Hearing shall be open to the public.

B. Standard of Proof. The Respondent(s) shall have the burden to show that he or she did not commit a violation of the Sunshine Ordinance.

C. Hearing Procedures.

1. Each Respondent and Complainant may speak on his or her own behalf, subject to the following time limits: each Respondent shall be permitted a five-minute statement; each Complainant shall be permitted a five-minute statement; and each Respondent shall be permitted a three-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.

2. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Each Respondent and Complainant may submit any documents to the Commission to support his or her position. Each party's written submission shall not exceed five pages, excluding supporting documents. Any documents so provided shall also be provided to the opposing party and shall be delivered to the Commission no later than five business days prior to the scheduled hearing. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail. Commissioners may question each party or any other person providing testimony regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.

3. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence.

D. Deliberations and Findings.

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. To determine that a violation of the Sunshine Ordinance did not occur, the Commission must conclude that, based on a preponderance of the evidence, the Respondent did not commit a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has not committed a violation of the Sunshine Ordinance. The finding that a Respondent did or did not commit a violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

E. Ethics Commission Orders.

1. If the Commission finds that a Respondent committed a violation of the Sunshine Ordinance, the Commission may issue orders requiring any or all of the following:

a. the Respondent(s) to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) violated the Sunshine Ordinance; and/or

c. The Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, or upon a finding of no violation, the Commission will take no further action on the matter.

F. Public Announcement.

Once the Commission determines that the Respondent did or did not commit a violation of the Sunshine Ordinance, the Commission will publicly announce this conclusion. The Commission's announcement may, but need not, include findings of law and fact.

CHAPTER THREE

I. COMPLAINTS ALLEGING WILLFUL VIOLATIONS OF THE SUNSHINE ORDINANCE BY ELECTED OFFICIALS OR DEPARTMENT HEADS OR COMPLAINTS FILED DIRECTLY WITH THE ETHICS COMMISSION ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE.

A. Matters heard under this Chapter.

1. Pursuant to Sunshine Ordinance, section 67.34, the Ethics Commission shall handle complaints alleging violations of the Sunshine Ordinance by an elected official or department head.

2. Pursuant to Sunshine Ordinance, section 67.35(d), if the District Attorney and/or Attorney General take no action for 40 days after receiving notification of a custodian's failure to comply with an order made pursuant to Sunshine Ordinance section 67.21(d) or (e), then the person who made the public record request may file a complaint directly with the Ethics Commission relating to that failure to comply.

3. Ethics Commission staff may initiate a complaint to allege a violation of the Sunshine Ordinance against any City officer or City employee.

4. This Chapter will govern:

a. referrals alleging willful violations of the Sunshine Ordinance against an elected official or department head, and

b. complaints initiated under subsections A.2 or A.3 alleging violations of the Sunshine Ordinance by any City officer or employee.

5. Any referral that does not allege a willful violation of the Sunshine Ordinance against an elected official or a department head shall be handled pursuant to Chapter Two of these regulations.

B. Scheduling of Hearing.

1. When the Executive Director receives a referral alleging a willful violation of the Sunshine Ordinance against an elected official or a department head, or when the Executive Director receives a complaint filed under subsection A.2, or when staff initiates a complaint under subsection A.3, the Executive Director shall, within 15 business days of the conclusion of his or her investigation, schedule a public hearing at the next regular meeting of the Commission, unless impracticable, provided that the hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.

2. Within 15 business days of the conclusion of his or her investigation, the Executive Director shall issue a written notice and his or her report and recommendation pursuant to Chapter Three, section II.C, to each Commission member, each Respondent, and each Complainant, including the date, time and location of the hearing.

3. In the case of a referral, the Executive Director also shall provide a courtesy notice and a copy of the report and recommendation to the referring body.

II. INVESTIGATION AND RECOMMENDATION

A. Factual Investigation.

Upon receipt of a complaint, the Executive Director shall conduct a factual investigation. The Executive Director's investigation may include, but shall not be limited to, interviews of the Respondent(s) and any witnesses, as well as the review of documentary and other evidence. The investigation shall be concluded within 30 days following the Executive Director's receipt of the complaint. The Executive Director may extend the time for good cause, including but not limited to: staffing levels; the number of other pending complaints under these Regulations or the Ethics Commission Regulations for Investigations and Enforcement Proceedings; other Ethics Commission proceedings; other staffing needs associated with pending campaigns; or the cooperation of witnesses, Complainants or Respondents. If the Executive Director extends the time for the investigation to conclude, his or her reasons for the extension shall be included in the report to the Ethics Commission.

B. Subpoenas.

During an investigation, the Executive Director may compel by subpoena the testimony of witnesses and the production of documents relevant to the investigation.

C. Report and Recommendation.

1. After the Executive Director has completed his or her investigation, the Executive Director shall prepare a written report and recommendation summarizing his or her factual and legal findings. The recommendation shall contain a summary of the relevant legal provisions and the evidence gathered through the Commission's investigation. To support the report and recommendation, the Executive Director may submit evidence through declaration. The report and recommendation shall not exceed ten pages excluding attachments.

2. The report shall recommend one of the following:

a. that Respondent(s) willfully violated the Sunshine Ordinance;

b. that Respondent(s) violated the Sunshine Ordinance but the violation was not willful; or

c. that Respondent(s) did not violate the Sunshine Ordinance.

D. Response to the Report and Recommendation.

1. Each Complainant and Respondent may submit a written response to the Director's report and recommendation. The response may contain legal arguments, a summary of evidence, and any mitigating or aggravating information. In support of the response, each Complainant and Respondent may submit evidence through declaration. The response shall not exceed ten pages excluding attachments.

2. If any Complainant or Respondent submits a response, he or she must deliver the response to all parties no later than five business days prior to the date of the hearing. The Complainant or Respondent must deliver eight copies of the response to the Executive Director, who must then immediately distribute copies of the response(s) to the Commission and any other Complainant or Respondent. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail.

III. PUBLIC HEARING

A. General Rules and Procedures.

1. The hearing shall be open to the public.

2. Each Complainant and Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.

3. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Commissioners may question each party regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.

4. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, Section I.E, then the Commission may make a decision in the party's absence.

5. Except when a complaint is staff-initiated or initiated pursuant to section 67.35(d), the Executive Director's role at the hearing will be limited to providing the report containing the legal and factual basis for his or her recommendation to the Commission and to respond to questions from the Commissioners.

B. Deliberations and Findings.

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance. The finding of a willful violation or non-willful violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

C. Ethics Commission Orders.

1. If the Commission finds that an elected official or a department head willfully violated the Sunshine Ordinance, the Commission shall so inform the Respondent's appointing authority, or the Mayor if Respondent is an elected official. In addition, the Commission may issue orders requiring any or all of the following if it finds that an elected official, a department head, or any City officer or City employee committed a violation of the Sunshine Ordinance:

a. the Respondent to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent violated the Sunshine Ordinance; and/or

c. the Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority, or the Mayor if the Respondent is an elected official, of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, the Commission will take no further action on the matter.

D. Finding of No Violation.

If the Commission determines that there is insufficient evidence to establish that the Respondent has committed a violation of the Sunshine Ordinance, the Commission shall publicly announce this fact. The Commission's announcement may, but need not, include findings of law and fact. Thereafter, the Commission will take no further action on the matter.

CHAPTER FOUR

I. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a complaint is filed with the Commission, no Commissioner shall engage in oral or written communications outside of a Commission meeting regarding the merits of the complaint with the Commission's staff, the Respondent(s), the Complainant(s), any member of the Task Force, the Supervisor of Records, any member of the public, or any person communicating on behalf of the Respondent(s), Complainant(s), the Supervisor of Records, or any member of the Task Force, except for communications, such as scheduling matters, generally conducted between a court and a party appearing before that court.

B. Access to Complaints and Related Documents and Deliberations.

Complaints, investigative files and information contained therein, shall be disclosed as necessary to the conduct of an investigation or as required by the California Public Records Act or the San Francisco Sunshine Ordinance. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff regarding complaints shall not be disclosed until the Commission has issued its final decision following the hearing.

C. Oaths and Affirmations.

The Commission may administer oaths and affirmations.

D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission and the public of the designation no later than the next business day.

E. Extensions of Time and Continuances.

1. Any Respondent or Complainant may request the continuance of a hearing date in writing. The requester must deliver the written request to the Commission Chairperson, and provide a copy of the request to all other parties no later than ten business days before the date of the hearing. The Commission Chairperson shall have the discretion to consider untimely requests. The Commission Chairperson shall approve or deny the request within five business days of the submission of the request. The Commission Chairperson may grant the request upon a showing of good cause.

2. The Commission or the Commission Chairperson may reschedule a hearing at their discretion for good cause.

At any time a hearing is placed on an agenda regarding a matter under Chapter II or III of these Regulations, four or more members must be in attendance. Otherwise, the hearing shall be continued to the next regular Ethics Commission meeting, unless impracticable.

F. Place of Delivery.

1. Whenever these Regulations require delivery to the Commission, its members, or the Executive Director, delivery shall be effected at the Commission office.

2. Whenever these Regulations require delivery to a Respondent or Complainant, delivery shall be effective and sufficient if made by U.S. mail, personal delivery or any other means of delivery agreed upon by the parties under Chapter One, section II, subsection K, to an address reasonably calculated to give notice to and reach the Respondent or Complainant.

3. Delivery is effective upon the date of delivery, not the date of receipt.

4. Delivery of documents to the Commission may be conducted via electronic mail after a written request is made and approved by the Executive Director.

G. Page Limitations and Format Requirements.

Whenever these Regulations impose a page limitation, a "page" means one side of an 8½ inch by 11 inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double-spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

H. Conclusion of Hearing.

For the purposes of these Regulations, a hearing concludes on the date on which the Commission announces its decision.

I. Complaints alleging both Sunshine Violations and Violations Handled Under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

If a complaint alleges both violations of the Sunshine Ordinance and violations handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings, the allegations involving violations of the Sunshine Ordinance shall be handled separately under these Regulations. Staff shall initiate a complaint of the alleged violations of the Sunshine Ordinance under Chapter Three, Section I.A.3 of these Regulations.

J. Certification by participating Commissioner if he or she did not attend proceedings held under Chapter II or III in their entirety.

Each Commissioner who participates in a decision, but who did not attend the hearing in its entirety, shall certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

II. SEVERABILITY

If any provision of these Regulations, or the application thereof, to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

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Ethics Commission Complaint No. 10-150331

Exhibit A

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR
CHAIRPERSON

PAUL A. RENNE
VICE-CHAIRPERSON

BRETT ANDREWS
COMMISSIONER

BEVERLY HAYON
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

REPORT AND RECOMMENDATION
ETHICS COMMISSION COMPLAINT NO. 03-140303

INTRODUCTION

This matter concerns a referral ("Referral") received by the Ethics Commission ("the Commission") on March 3, 2014, from the Sunshine Ordinance Task Force ("Task Force") regarding its motion concerning complaint number 12058:

> "Member Knee, seconded by Member Oka, moved to find the Recreation and Park Department in violation of the Sunshine Ordinance as determined in the Order of Determination (Sections 67.21(e), 67.24(g) and 67.34); referral to the Ethics Commission for enforcement specifically naming Phil Ginsburg, Director Recreation and Park Department responsible."

Pursuant to Chapter Three of the Commission's Regulations for Handling Violations of the Sunshine Ordinance ("Regulations"), this report summarizes applicable legal provisions, evidence gathered, and the Executive Director's factual and legal findings.

The report primarily addresses two main issues: (1) whether the Task Force properly named Phil Ginsburg as Respondent in this matter after the hearing concluded and the was Order issued; and (2) whether the redaction of home address and phone information of individuals who are not City employees on otherwise properly produced

documents violates section 67.26 of the San Francisco Sunshine Ordinance ("Ordinance").

Pursuant to Chapter Three of the Regulations, and for the reasons described below, this report recommends that the Commission find that Phil Ginsburg did not violate the Ordinance. The Commission is not bound by the Executive Director's recommendation.

SUMMARY OF EVIDENCE GATHERED

Staff reviewed the Task Force's complaint procedures, audio recordings of the Task Force meetings[1], and the documents provided to the Task Force related to this matter (attached as Appendix B). Staff also reviewed the original records request and the Department's response. Because there was no factual dispute, staff conducted no interviews.

SUMMARY OF FACTUAL FINDINGS

A. Document Request and Response.

1. On November 22, 2012, Dominic Maionchi made a document request to John Moren at the Recreation and Park Department ("the Department") for "copies of the contracts for all people on the 90 foot wait list." (Appx. B, p. 44.)

2. On December 3, 2012, Olive Gong, Custodian of Records for the Department, provided Mr. Maionchi with a copy of the San Francisco Marina Wait List Renewal Application ("application") for each of the five individuals on the Marina wait list.[2] (Appx B, p. 43.)

3. Each application contained a redaction over the home address and home phone number of the applicant. No other information was redacted. (Appx. B, pp. 45 – 49.)

4. Ms. Gong provided the legal justification for the redactions citing an individual's right to privacy under California Constitution, Article 1, section 1; and California Government Code,

[1] Because of the inconsistencies between the Referral and the Order, staff reviewed the oral motions made at each meeting related to this matter.

[2] The department maintains a wait list for individuals who want to hold a berth at the San Francisco Marina. An applicant must pay $75.00 per fiscal year to hold his or her place. As berths become available, they are offered to individuals remaining on the wait list in order of seniority. Once a berth becomes available, an applicant has 15 days to accept the lease offer for the berth.

sections 6254(c) and 6254(k). She further stated that Government Code, section 6250, and Ordinance, section 67.1(g), acknowledge the importance of protecting personal privacy when disclosing public records. (Appx. B, p. 43.)[3]

B. Task Force Complaint and Hearings.

1. On December 12, 2012, Mr. Maionchi filed a complaint with the Task Force, alleging that Olive Gong was the contact for the Department, and that the response to his request violated Ordinance, sections 67.21(b), 67.24(e)(1), and 67.24(i). (Appx. B, p. 85.) Ms. Gong responded to the complaint with legal justifications for the redactions. (Appx. B, pp. 88 – 94.)

2. The Task Force held the hearing on this matter on May 1, 2013, and concluded that the redactions violated Ordinance, section 67.26. (Appx. B, pp. 7, 22 – 24.)[4] Ms. Gong and Mr. Maionchi attended. There was no dispute that the five applications were the only responsive documents to the request.

3. On June 12, 2013, the Task Force issued the following written Order of Determination ("Order"): "[the Department] violated Section 67.26 of the [Ordinance] for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee ["CAC"] on July 16, 2013."[5] The Order named only Ms. Gong as the Respondent. (Appx. B, pp. 3 – 4.)

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[3] The Office of the City Attorney provides general guidance to City departments regarding their obligations under the Government Code and Ordinance in its Good Government Guide. While this guide is not legal advice, it is the primary resource for all City departments and officials to determine how best to comply with various good government provisions. In the Good Government Guide, the City Attorney implies that a balancing test may be applied regarding privacy exemptions and that the general rule is that departments should not disclose home addresses, home phone numbers, and personal e-mail addresses of members of the public. (*See* GGG, Ch. Three, § II.G.2.b, Ed. 2010-2011, p. 93 – 94.) The Good Government Guide does not cite Ordinance, section 67.24(i), for this proposition.

[4] Only draft minutes were available on the Task Force's website for each meeting referenced as of the date of issuance of this Report and Recommendation.

[5] The Order did not contain violations of Ordinance, sections 67.21(e), 67.24(g) and 67.34, or name Phil Ginsburg as "responsible" as stated in the Referral.

4. On July 16, 2013, the CAC convened to monitor compliance with the Order. (Appx. B, pp. 13 and 33.) Ms. Gong and Mr. Maionchi were both present, and the CAC voted to send the matter back to the full Task Force with a recommendation that the Task Force refer the matter to the Commission for a willful violation of the Ordinance. (Appx. B, p. 34.) The motion did not include adding Phil Ginsburg as the Respondent.[6] (*Id.*)

5. On September 23, 2013, the Task Force sent a "NOTICE OF HEARING: Task Force Meeting October 2, 2013." (Appx. B, p. 51.) The notice was sent to 20 recipients, and stated that each recipient was either a complainant or respondent in one of six Task Force complaints. Ms. Gong, as well as Mr. Ginsburg, and another Department employee, Sarah Ballard, were included in the notice.

6. On September 26, 2013, the Task Force sent an email to Ms. Gong, copied to Mr. Ginsburg and Ms. Ballard, stating that "[a]s a reminder the [Task Force] requested the presence of Mr. Ginsburg and Ms. Ballard to attend the [meeting]." (Appx. B, p. 50.)

7. The matter was not heard at the October meeting, and a new notice was sent on October 24, 2013, in the same format as the notice sent on September 23, regarding the Task Force meeting on November 6, 2013. (Appx. B, p. 54.)

8. On November 6, 2013, the Task Force met and voted to refer the matter to the Commission. (Appx. B, pp. 16 and 36 – 37.) The Task Force included additional violations and named Phil Ginsburg as "responsible" in the motion to refer the matter to the Commission.[7]

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[6] Staff reviewed the oral motion made at the CAC meeting of July 16, 2013, and confirmed that the motion was to refer the "matter" to the Task Force, without naming Mr. Ginsburg in the motion. The CAC also included a violation against the City Attorney's Office, but that issue was not pursued by the Task Force.

[7] The agenda for the November meeting did not indicate that the Task Force was considering additional violations. In addition, just prior to making the motion, the Chair asked if there was a motion to find a violation, and the maker of the motion stated that a violation has already been found and that this matter was not being re-adjudicated. The maker then proceeded to add additional violations to the motion. (Audio recording, Task Force Meeting, November 6, 2013, at time mark 2:06:19.)

9. The Task Force approved the motion as reflected in the written Referral. Ms. Gong was not referenced in the motion to refer the matter to the Commission.[8] (Appx. B, pp. 36 – 37.)

10. The Task Force member moving for referral at the November 6, 2013, meeting included Ordinance, section 67.34 in the referral, so that the department head, Mr. Ginsburg, could be held responsible for the violation.[9] The member also stated that Ordinance, section 67.21(e), was included in the motion because the Department did not send a representative to the Task Force meetings who was "sufficiently" knowledgeable, and included Ordinance, section 67.24(g), because the Ordinance prohibits reliance on Government Code, section 6255.

SUMMARY OF APPLICABLE LAW[10]

A. City Law Relevant to the Procedural Issues in This Matter.

1. Ordinance, section 67.21(e), empowers the Task Force to conduct a public hearing concerning a records request denial.

2. Pursuant to the Task Force's Public Complaint Procedure ("CP"), after considering all the testimony at the hearing, the Task Force must vote on and notify the complainant and respondent in writing of any Order or other directive, and the CAC is responsible for monitoring compliance with that Order or directive. (CP, §§ D.3, D.4 and F.1.)

3. If the CAC determines that there is a failure to comply with the Order, the CAC may recommend that the Task Force notify the Commission to take "measures they deem necessary to ensure compliance with the Ordinance."[11] (CP, § F.2.)

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[8] Although, Ms. Gong was not included in the motion to refer, the written referral repeatedly stated that Ms. Gong was the Respondent at the hearing, the CAC meeting, and at the November meeting to refer the matter. The written referral was delivered to the Commission as "referral to [the Commission] – Dominic Maionchi against Phil Ginsburg."

[9] The written Referral, inconsistent with the motion, indicated that it was made pursuant to Ordinance, section 67.30(c), which requires the Commission to handle a referral pursuant to Chapter Two of the Regulations.

[10] Staff has attached relevant code sections and legal authority to this Report and Recommendation in Appendix A.

[11] The Task Force may also notify the District Attorney, the Attorney General, and/or the Board of Supervisors.

4. Neither the Ordinance nor the CP indicate that the Task Force may find additional violations of the Ordinance, or add respondents after the conclusion of the hearing on the records request denial and the issuance of an order, whether at a CAC meeting or at a subsequent meeting of the full Task Force to vote on a referral to the Commission.[12]

5. Referrals of willful violations (Ordinance, section 67.34) by department heads are handled pursuant to Chapter Three of the Regulations. For the Commission to find a willful violation of the Ordinance, it must conclude that, based on a preponderance of the evidence, a respondent acted or failed to act with the knowledge that such act or failure to act was a violation of the Ordinance. (Regulations, Ch. One, § II.U; and Ch. Three, § III.B.2.)

B. State Law Relevant to the Redaction of Produced Documents in This Matter.

1. Privacy is a constitutional right in California that is recognized in the California Public Records Act ("PRA"). (Cal. Const., Art. 1, § 1; PRA, § 6250.)

2. PRA, section 6254(c), exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Personal information may be withheld (or redacted) if the public interest in nondisclosure clearly outweighs the public interest in disclosure. (*City of San Jose v. Superior Court* (1999) 74 Cal App. 4th 1008, 1018 – 1020.) A court undertaking this balancing test in the context of an individual's home address will consider whether disclosure of that address will "shed light on an agency's performance of its statutory duties." (*Id.* at 1019, *quoting Voinche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330.)

3. Under this standard, the refusal to provide home addresses of residents who made airport noise complaints to the City of San Jose was permissible under PRA, section 6254(c). (*City of San Jose v. Superior Court*, *supra*, 74 Cal App. 4th 1008.) Conversely, the disclosure of names

[12] The Task Force may reconsider a matter upon petition with an offer of proof as to new information. (CP, § E.)

and addresses of excessive water users was required under this standard. (*New York Times Co. v. Superior Court* (1990) 218 Cal. App. 3d 1579.)[13]

4. The California Supreme Court has also found that a public entity's release of an employee's personal address and phone number may constitute an unconstitutional and actionable invasion of privacy if a balancing of interests does not favor disclosure of that information. (*County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal. 4th 905.)

C. City Law Relevant to the Redaction of Produced Documents in This Matter.

1. PRA, section 6253(e), provides that local agencies may adopt requirements that allow greater access to records than prescribed by the minimum standards set forth in the PRA, except as otherwise prohibited by law. The Ordinance provides for such additional access.

2. Ordinance, section 67.24(i), prohibits City agencies from asserting "an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of [the Ordinance] providing for withholding of the specific type of information in question or on an express and specific exemption provided by [the PRA] that is not forbidden by [the Ordinance]."

3. Ordinance, section 67.26, provides in relevant part that "[i]nformation that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of [the Ordinance]."

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[13] Courts interpreting PRA, section 6254(c), often refer to cases construing the federal Freedom of Information Act, upon which the Government Code is modeled. In this regard, federal courts have found that the workings of agencies are not better understood by the disclosure of identity of employees, or of private citizens who wrote to government officials (*Voinche v. FBI, supra*, 940 F. Supp. 323, 329 – 330) and have upheld the nondisclosure of names and addresses on an employee payroll. (*Painting Industry of Hawaii v. Dep't. of Air Force* (9th Cir. 1994) 26 F.3d 1479.)

4. Ordinance, section 67.27, indicates that documents may be withheld based a specific PRA or Ordinance exemption, on statutory authority outside the PRA, and "on the basis that disclosure would incur civil or criminal liability," but any such withholding must cite statutory or case law supporting that position.

5. San Francisco Administrative Code, section 12.M.2(a), states that "[t]he City shall not disclose Private Information to any person or entity unless specifically authorized to do so by the subject individual or by Contract or where required by Federal or State law or judicial order."[14]

D. Other Relevant City Laws in This Matter.

1. Ordinance, section 67.21(e) provides in relevant part that "[a]n authorized representative of the custodian of the public records requested shall attend any [Task Force] hearing and explain the basis for its decision to withhold the records requested."

2. Ordinance, section 67.24(g), states that "[n]either the City nor any office, employee, or agent thereof may assert [PRA] Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance."

LEGAL FINDINGS

1. This matter concerns a complaint that Phil Ginsburg willfully violated the Ordinance. Any finding of a willful violation must be supported by a preponderance of the evidence.

2. No authority exists in either the Ordinance or the CP which permitted the Task Force to name Phil Ginsburg as "responsible" after the hearing on the matter concluded and the Order was issued. The Task Force failed to adhere to its procedure, and deprived Mr. Ginsburg of due process as he was not able to contest the complaint prior to the issuance of the Order.[15]

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[14] "Private Information" means "any information that (1) could be used to identify an individual, including without limitation name, address, social security number, medical information, financial information, date and location of birth, and names of relative; or (2) the law forbids any person from disclosing." (S.F. Admin. Code, § 12.M.1(e).)

[15] A finding of "willful failure" is deemed to be official misconduct. (S.F. Admin. Code, § 67.34). A charge of official misconduct is serious and could result in the removal of the official from office. (S.F. Charter, § 15.105.)

(*Louisville & N. R. Co. v. Schmidt* (1900) 177 U.S. 230, 236 [essential elements of due process of law are notice and opportunity to defend]; *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 – 315.)

3. Although the Task Force summarily decided at its November meeting that a department head is ultimately responsible for the operations of his or her department and included Mr. Ginsburg in the Referral, it heard no evidence with respect to this issue at the hearing held on May 1, 2013. Ms. Gong stated at the hearing (and at subsequent meetings) that she was responsible for the records request, and that she is the Department's Custodian of Records. Therefore, Mr. Ginsburg did not commit a willful (or non-willful) violation of the Ordinance and the Commission may dismiss this matter on that basis.

4. The Ordinance is clear that withholding of public records may not be based on a balancing test like the one regarding privacy contained in PRA, section 6254(c)[16] [17], and that the Ordinance's provisions supersede other local laws. (S.F. Admin. Code, §§ 67.24(i) and 67.36.) However, redaction of the personal addresses and phone numbers of City residents is likely not contrary to the Ordinance because the disclosure of such information:

(a) would appear at odds with the Ordinance's recognition of the right to privacy (Ordinance, § 67.1(g)["private . . . individuals . . . have rights to privacy that must be respected"]);

(b) would not appear to further the Ordinance's purpose of helping "the people to know what their government . . . [is] doing." (Ordinance, § 67.1(d).)

(c) could potentially give rise to an invasion of privacy claim under the *County of Los Angeles* case, which may justify the withholding under Ordinance, section 67.27(c);

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[16] The exemptions contained in PRA, section 6254(k), not related to privilege, also requires a balancing test.

[17] The Task Force based its determination that the address and phone number of each applicant should be disclosed in part by considering that the applications were contracts pursuant to Ordinance, section 67.24(e). Staff questions the applicability of that provision, which concerns bids, RFPs, and related contracts, to the applications at issue here because the purpose of the fee and application was to hold a place in line for the opportunity to enter into an agreement with the City.

(d) would be impermissible under Administrative Code, section 12.M.2, which was enacted in 2006 via voter initiative (after the Ordinance) and more specifically addresses disclosure of private information, and thus appears to limit the scope of the Ordinance's disclosure provisions with respect to private information (Cal. Code Civ. Proc., § 1859; *In re Greg F.* (2012) 55 Cal. 4th 393, 407; *United States v. Juvenile Male* (9th Cir. 2012) 670 F.3d 999, 1008 ["[w]here two statutes conflict, the later-enacted, more specific provision generally governs]"); and

(e) would lead to the incongruous result of higher privacy protections for City employees than City residents. (*See e.g.* S.F. Admin. Code, § 67.24(c)(2) [employee's home address and phone number must be redacted from resume if disclosed].)

Although redacting the home address and phone number may be permissible under the Ordinance, Ms. Gong appears to have violated Ordinance, section 67.26, by not citing the "appropriate justification" for the redactions as required by that section.[18]

5. Even if impermissible under the Ordinance, the redactions and refusal to release home addresses and home phone numbers of members of the public were nevertheless not a willful act under Ordinance, section 67.34, given state and federal law privacy protections for address and phone information, and the general advice issued by the Good Government Guide.

6. Ms. Gong attended the hearing on May 1, 2013, the CAC meeting on July 16, 2013, and the Referral meeting on November 6, 2013, in compliance with Ordinance, section 67.21(e).

7. Ms. Gong did not assert in her response to the records request that PRA, section 6255, was the basis for the redactions, in compliance with Ordinance, section 67.24(g).

RECOMMENDATION

Staff recommends that the Commission find that Phil Ginsburg did not violate the Ordinance.

[18] Ms. Gong was not referred to the Commission, and thus is not a respondent before the Commission with respect to this Referral.

APPENDIX A

Authority	Starts at Bates Stamp
State Constitution, Statutes, and Codes	
California Constitution, Article 1, section 1	001
California Code of Civil Procedure, section 1859	037
Public Records Act (PRA)	002
City Charter, Codes and Ordinances	
San Francisco Administrative Code, Chapter 12M	039
San Francisco City Charter, Article XV	218
San Francisco Sunshine Ordinance	041
Agency Regulations, Procedures, and Guides	
Ethics Commission Regulations for Handling Violations of the Sunshine Ordinance	057
Good Government Guide, Part Three	073
Sunshine Ordinance Task Force Complaint Procedure	052
Federal Cases	
Louisville & N. R. Co. v. Schmidt (1900) 177 U.S. 230	169
Mullane v. Cent. Hanover Bank & Trust Co. (1950) 339 U.S. 306	175
Painting Industry of Hawaii v. Dep't. of Air Force (9th Cir. 1994) 26 F.3d 1479	199
United States v. Juvenile Male (9th Cir. 2012) 670 F.3d 999	185
Voinche v. FBI (D.D.C. 1996) 940 F. Supp. 323	208
State Cases	
City of San Jose v. Superior Court (1999) 74 Cal. App. 4th 1008	156
County of Los Angles v. Los Angeles County Employee Relations Commission (2013) 56 Cal. 4th 905	104
In re Greg F. (2012) 55 Cal. 4th 393	125
New York Times v. Superior Court (1990) 218 Cal. App. 3d 1579	150

California. LEGISLATIVE INFORMATION

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CALIFORNIA CONSTITUTION - CONS

ARTICLE I DECLARATION OF RIGHTS [SECTION 1 - SEC. 31] *(Article 1 adopted 1879.)*

SECTION 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
(Sec. 1 added Nov. 5, 1974, by Proposition 7. Resolution Chapter 90, 1974.)

SEC. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

(b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.
(Sec. 2 amended June 3, 1980, by Prop. 5. Res.Ch. 77, 1976.)

SEC. 3. (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantee that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.
(Sec. 3 amended Nov. 2, 2004, by Prop. 59. Res.Ch. 1, 2004.)

SEC. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

California. LEGISLATIVE INFORMATION

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GOVERNMENT CODE - GOV
TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 7. MISCELLANEOUS [6000 - 7635] *(Division 7 enacted by Stats. 1943, Ch. 134.)*
CHAPTER 3.5. Inspection of Public Records [6250 - 6276.48] *(Chapter 3.5 added by Stats. 1968, Ch. 1473.)*

ARTICLE 1. General Provisions [6250 - 6276] *(Article 1 heading added by Stats. 1968, Ch. 620, Sec. 1.)*

6250. In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.
(Amended by Stats. 1970, Ch. 575.)

6251. This chapter shall be known and may be cited as the California Public Records Act.
(Added by Stats. 1968, Ch. 1473.)

6252. As used in this chapter:

(a) "Local agency" includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952.

(b) "Member of the public" means any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment.

(c) "Person" includes any natural person, corporation, partnership, limited liability company, firm, or association.

(d) "Public agency" means any state or local agency.

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.

(f) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.

(g) "Writing" means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.
(Amended by Stats. 2004, Ch. 337, Sec. 1. Effective January 1, 2005.)

6252.5. Notwithstanding the definition of "member of the public" in Section 6252, an elected member or officer of any state or local agency is entitled to access to public records of that agency on the same basis as any other person. Nothing in this section shall limit the ability of elected members or officers to access public records permitted by law in the administration of their duties.

This section does not constitute a change in, but is declaratory of, existing law.
(Added by Stats. 1998, Ch. 620, Sec. 3. Effective January 1, 1999.)

6252.6. Notwithstanding paragraph (2) of subdivision (e) of Section 827 of the Welfare and Institutions Code, after the death of a foster child who is a minor, the name, date of birth, and date of death of the child shall be subject to disclosure by the county child welfare agency pursuant to this chapter.
(Added by Stats. 2003, Ch. 847, Sec. 3. Effective January 1, 2004.)

6252.7. Notwithstanding Section 6252.5 or any other provision of law, when the members of a legislative body of a local agency are authorized to access a writing of the body or of the agency as permitted by law in the administration of their duties, the local agency, as defined in Section 54951, shall not discriminate between or among any of those members as to which writing or portion thereof is made available or when it is made available.
(Added by Stats. 2008, Ch. 63, Sec. 2. Effective January 1, 2009.)

6253. (a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available

to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

(d) Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

(e) Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

(Amended by Stats. 2001, Ch. 355, Sec. 2. Effective January 1, 2002.)

6253.1. (a) When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, shall do all of the following, to the extent reasonable under the circumstances:

(1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.

(2) Describe the information technology and physical location in which the records exist.

(3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

(b) The requirements of paragraph (1) of subdivision (a) shall be deemed to have been satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records.

(c) The requirements of subdivision (a) are in addition to any action required of a public agency by Section 6253.

(d) This section shall not apply to a request for public records if any of the following applies:

(1) The public agency makes available the requested records pursuant to Section 6253.

(2) The public agency determines that the request should be denied and bases that determination solely on an exemption listed in Section 6254.

(3) The public agency makes available an index of its records.

(Added by Stats. 2001, Ch. 355, Sec. 3. Effective January 1, 2002.)

6253.2. (a) Notwithstanding any other provision of this chapter to the contrary, information regarding persons paid by the state to provide in-home supportive services pursuant to Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code, or services provided pursuant to Section 14132.952, or 14132.956 of the Welfare and Institutions Code, is not subject to public disclosure pursuant to this chapter, except as provided in subdivision (b).

(b) Copies of names, addresses, and telephone numbers of persons described in subdivision (a) shall be made available, upon request, to an exclusive bargaining agent and to any labor organization seeking representation rights pursuant to Section 12301.6 or Section 12302.25 of the Welfare and Institutions Code or Chapter 10 (commencing with Section 3500) of Division 4 of Title 1. This information shall not be used by the receiving entity for any purpose other than the employee organizing, representation, and assistance activities of the labor organization.

(c) This section applies solely to individuals who provide services under the In-Home Supportive Services Program (Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code) or the Personal Care Services Program pursuant to Section 14132.95 of the Welfare and Institutions Code.

(d) Nothing in this section is intended to alter or shall be interpreted to alter the rights of parties under the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4) or any other labor relations law.

(e) This section shall be operative only if Section 1 of the act that added this subdivision becomes inoperative pursuant to subdivision (e) of that Section 1.

(Amended (as amended by Stats. 2012, Ch. 439, Sec. 1) by Stats. 2013, Ch. 37, Sec. 2. Effective June 27, 2013. This version is conditionally operative, as prescribed by its own provisions.)

6253.3. A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter.

(Added by Stats. 2008, Ch. 62, Sec. 1. Effective January 1, 2009.)

6253.31. Notwithstanding any contract term to the contrary, a contract entered into by a state or local agency subject to this chapter, including the University of California, that requires a private entity to review, audit, or report on any aspect of that agency shall be public to the extent the contract is otherwise subject to disclosure under this chapter.

(Added by Stats. 2009, Ch. 62, Sec. 2. Effective January 1, 2009.)

6253.4. (a) Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section.

The following state and local bodies shall establish written guidelines for accessibility of records. A copy of these guidelines shall be posted in a conspicuous public place at the offices of these bodies, and a copy of the guidelines shall be available upon request free of charge to any person requesting that body's records:

Department of Motor Vehicles

Department of Consumer Affairs

Transportation Agency

Bureau of Real Estate

Department of Corrections and Rehabilitation

Division of Juvenile Justice

Department of Justice

Department of Insurance

Department of Business Oversight

Department of Managed Health Care

Secretary of State

State Air Resources Board

Department of Water Resources

Department of Parks and Recreation

San Francisco Bay Conservation and Development Commission

State Board of Equalization

State Department of Health Care Services

Employment Development Department

State Department of Public Health

State Department of Social Services

State Department of State Hospitals

State Department of Developmental Services
Public Employees' Retirement System
Teachers' Retirement Board
Department of Industrial Relations
Department of General Services
Department of Veterans Affairs
Public Utilities Commission
California Coastal Commission
State Water Resources Control Board
San Francisco Bay Area Rapid Transit District
All regional water quality control boards
Los Angeles County Air Pollution Control District
Bay Area Air Pollution Control District
Golden Gate Bridge, Highway and Transportation District
Department of Toxic Substances Control
Office of Environmental Health Hazard Assessment

(b) Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public. The guidelines and regulations adopted pursuant to this section shall not operate to limit the hours public records are open for inspection as prescribed in Section 6253.

(Amended by Stats. 2013, Ch. 22, Sec. 7. Effective June 27, 2013. Operative July 1, 2013, by Sec. 110 of Ch. 22.)

6253.5. Notwithstanding Sections 6252 and 6253, statewide, county, city, and district initiative, referendum, and recall petitions, petitions circulated pursuant to Section 5091 of the Education Code, petitions for the reorganization of school districts submitted pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of the Education Code, petitions for the reorganization of community college districts submitted pursuant to Part 46 (commencing with Section 74000) of the Education Code and all memoranda prepared by the county elections officials in the examination of the petitions indicating which registered voters have signed particular petitions shall not be deemed to be public records and shall not be open to inspection except by the public officer or public employees who have the duty of receiving, examining or preserving the petitions or who are responsible for the preparation of that memoranda and, if the petition is found to be insufficient, by the proponents of the petition and the representatives of the proponents as may be designated by the proponents in writing in order to determine which signatures were disqualified and the reasons therefor. However, the Attorney General, the Secretary of State, the Fair Political Practices Commission, a district attorney, a school district or a community college district attorney, and a city attorney shall be permitted to examine the material upon approval of the appropriate superior court.

If the proponents of a petition are permitted to examine the petition and memoranda, the examination shall commence not later than 21 days after certification of insufficiency.

(a) As used in this section, "petition" shall mean any petition to which a registered voter has affixed his or her signature. -

(b) As used in this section "proponents of the petition" means the following:

(1) For statewide initiative and referendum measures, the person or persons who submit a draft of a petition proposing the measure to the Attorney General with a request that he or she prepare a title and summary of the chief purpose and points of the proposed measure.

(2) For other initiative and referenda on measures, the person or persons who publish a notice of intention to circulate petitions, or, where publication is not required, who file petitions with the elections official.

(3) For recall measures, the person or persons defined in Section 343 of the Elections Code.

(4) For petitions circulated pursuant to Section 5091 of the Education Code, the person or persons having charge of the petition who submit the petition to the county superintendent of schools.

(5) For petitions circulated pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of the Education Code, the person or persons designated as chief petitioners under Section 35701 of the Education Code.

(6) For petitions circulated pursuant to Part 46 (commencing with Section 74000) of the Education Code, the person or persons designated as chief petitioners under Sections 74102, 74133, and 74152 of the Education Code.

(Amended by Stats. 1994, Ch. 923, Sec. 32. Effective January 1, 1995.)

6253.6. (a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same.

(b) Nothing contained in subdivision (a) shall be construed as prohibiting any person who is otherwise author ized by law from examining election materials, including, but not limited to, affidavits of registration, provided that requests for bilingual ballots or ballot pamphlets shall be subject to the restrictions contained in subdivision (a).

(Amended by Stats. 1995, Ch. 1129, Sec. 1.)

6253.8. (a) Every final enforcement order issued by an agency listed in subdivision (b) under any provision of law that is administered by an entity listed in subdivision (b), shall be displayed on the entity's Internet website. If the final enforcement order is a public record that is not exempt from disclosure pursuant to this chapter.

(b) This section applies to the California Environmental Protection Agency and to all of the following entities within the agency:

(1) The State Air Resources Board.

(2) The California Integrated Waste Management Board.

(3) The State Water Resources Control Board, and each California regional water quality control board.

(4) The Department of Pesticide Regulation.

(5) The Department of Toxic Substances Control.

(c) (1) Except as provided in paragraph (2), for purposes of this section, an enforcement order is final when the time for judicial review has expired on or after January 1, 2001, or when all means of judicial review have been exhausted on or after January 1, 2001.

(2) In addition to the requirements of paragraph (1), with regard to a final enforcement order issued by the State Water Resources Control Board or a California regional water quality control board, this section shall apply only to a final enforcement order adopted by that board or a regional board at a public meeting.

(d) An order posted pursuant to this section shall be posted for not less than one year.

(e) The California Environmental Protection Agency shall oversee the implementation of this section.

(f) This section shall become operative April 1, 2001.

(Added by Stats. 2000, Ch. 783, Sec. 1. Effective January 1, 2001. Section operative April 1, 2001, by its own provisions.)

6253.9. (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:

(1) The agency shall make the information available in any electronic format in which it holds the information.

(2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

(b) Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:

(1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

(2) The request would require data compilation, extraction, or programming to produce the record.

(c) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.

(d) If the request is for information in other than electronic format, and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format.

(e) Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.

(f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

(g) Nothing in this section shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute.

(Added by Stats. 2000, Ch. 982, Sec. 2. Effective January 1, 2001.)

6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to any of the following:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state

agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(a) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

(b) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision.

Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the responses thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph may not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. Nothing in this paragraph shall be construed to prohibit or limit a scholarly, journalistic, political, or governmental use of address information obtained pursuant to this paragraph.

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 2 of the Education Code.

(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

(i) Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to,

provisions of the Evidence Code relating to privilege.

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application that are subject to disclosure under the provisions of law.

(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

(q) (1) Records of state agencies related to activities governed by Article 2.6 (commencing with Section 14081), Article 2.8 (commencing with Section 14087.5), and Article 2.91 (commencing with Section 14089) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees.

(2) Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. If a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed.

(3) Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Legislative Analyst's Office. The committee and that office shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

(r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Care Services pursuant to subdivision (b) of Section 1282 of the Health and Safety Code.

(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with Section 32000) of the Health and Safety Code, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) of Chapter 5 of Part 2 of Division 3 of Title 4 (commencing with Section 37650) of Chapter 5 of Part 2 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to Section 10133 of the Insurance Code. However, the record shall be open to inspection within one year after the contract is fully executed.

(u) (1) Information contained in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.

(2) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(3) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(v) (1) Records of the Managed Risk Medical Insurance Board and the State Department of Health Care Services related to activities governed by Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), and Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, and Chapter 2 (commencing with Section 15810) of Part 3.3 of Division 9 of the Welfare and Institutions Code, and that reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board or the department, entities with which the board or the department is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board or the department provides,

receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff or the department or its staff, or records that provide instructions, advice, or training to their employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.3 (commencing with Section 12693), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, or Chapter 2.2 (commencing with Section 15850) of Part 3.3 of Division 2 of the Welfare and Institutions Code, on or after July 1, 1991, shall be open to inspection one year after their effective dates.

(B) If a contract that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (3).

(v) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

(3) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (2).

(w) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of Consumer Affairs pursuant to Chapter 20 (commencing with Section 9800) of Division 3 of the Business and Professions Code, for the purpose of establishing the service contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

(y) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, and that reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, on or after January 1, 1998, shall be open to inspection one year after their effective dates.

(B) If a contract entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12702.50) of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

(5) The exemption from disclosure provided pursuant to this subdivision for the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff shall also apply to the contractor, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of applicants pursuant to Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code.

(z) Records obtained pursuant to paragraph (2) of subdivision (f) of Section 2891.1 of the Public Utilities Code.

(aa) A document prepared by or for a state or local agency that assesses the vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

(ab) Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the California Emergency Management Agency for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, "voluntarily submitted" means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

(ac) All information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry, except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative.

(ad) The following records of the State Compensation Insurance Fund:

(1) Records related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed.

(2) Records related to the discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the fund, and any related deliberations.

(3) Records related to the impressions, opinions, recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code.

(4) Records obtained to provide workers' compensation insurance under Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, including, but not limited to, any medical claims information, policyholder information provided that nothing in this paragraph shall be interpreted to prevent an insurance agent or broker from obtaining proprietary information or other information authorized by law to be obtained by the agent or broker, and information on rates, pricing, and claims handling received from brokers.

(5) (A) Records that are trade secrets pursuant to Section 6276.44, or Article 11 (commencing with Section 1060) of Chapter 4 of Division 8 of the Evidence Code, including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections.

(B) Notwithstanding subparagraph (A), the portions of records containing trade secrets shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(6) (A) Internal audits containing proprietary information and the following records that are related to an internal audit:

(i) Personal papers and correspondence of any person providing assistance to the fund when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn, or upon order of the fund.

(ii) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed or an internal audit that contains proprietary information.

(B) Notwithstanding subparagraph (A), the portions of records containing proprietary information, or any information specified in subparagraph (A) shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(7) (A) Except as provided in subparagraph (C), contracts entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code shall be open to inspection one year after the contract has been fully executed.

(B) If a contract entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(C) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(D) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to this pa ragraph.

(E) This paragraph is not intended to apply to documents related to contracts with public entities that are not otherwise expressly confidential as to that public entity.

(F) For purposes of this paragraph, "fully executed" means the point in time when all of the necessary parties to the contract have signed the contract.

This section shall not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

This section shall not prevent any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158).

(Amended by Stats. 2013, Ch. 352, Sec. 106. Effective September 26, 2013. Operative July 1, 2013, by Sec. 543 of Ch. 352.)

6254.1. (a) Except as provided in Section 6254.7, nothing in this chapter requires disclosure of records that are the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information, in accordance with Section 18081 of the Health and Safety Code.

(b) Nothing in this chapter requires the disclosure of the residence or mailing address of any person in any record of the Department of Motor Vehicles except in accordance with Section 1808.21 of the Vehicle Code.

(c) Nothing in this chapter requires the disclosure of the results of a test undertaken pursuant to Section 12804.8 of the Vehicle Code.

(Amended by Stats. 1998, Ch. 946, Sec. 1. Effective January 1, 1999.)

6254.2. (a) Nothing in this chapter exempts from public disclosure the same categories of pesticide safety and efficacy information that are disclosable under paragraph (1) of subsection (d) of Section 10 of the federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136h(d)(1)), if the individual requesting the information is not an officer, employee, or agent specified in subdivision (b) and signs the affirmation specified in subdivision (b).

(b) The Director of Pesticide Regulation, upon his or her initiative, or upon receipt of a request pursuant to this chapter for the release of data submitted and designated as a trade secret by a registrant or applicant, shall determine whether any or all of the data so submitted is a properly designated trade secret. In order to assure that the interested public has an opportunity to obtain and review pesticide safety and efficacy data and to comment prior to the expiration of the public comment period on a proposed pesticide registration, the director shall provide notice to interested persons when an application for registration enters the registration evaluation process.

(c) If the director determines that the data is not a trade secret, the director shall notify the registrant or applicant by certified mail.

(d) The registrant or applicant shall have 30 days after receipt of this notification to provide the director with a complete justification and statement of the grounds on which the trade secret privilege is claimed. This justification and statement shall be submitted by certified mail.

(e) The director shall determine whether the data is protected as a trade secret within 15 days after receipt of the justification and statement or, if no justification and statement is filed, within 45 days of the original notice. The director shall notify the registrant or applicant and any party who has requested the data pursuant to this chapter of that determination by certified mail. If the director determines that the data is not protected as a trade secret, the final notice shall also specify a date, not sooner than 15 days after the date of mailing of the final notice, when the data shall be available to any person requesting information pursuant to subdivision (a).

(f) "Trade secret" means data that is not reasonably considered to have been publicly known or available, that is not readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and that is not otherwise readily available to competitors who could obtain economic value from its disclosure or use.

(g) This section shall be operative only so long as, and to the extent that, enforcement of paragraph (1) of subsection (d) of Section 10 of the federal Insecticide, Fungicide, and Rodenticide Act has not been enjoined by federal court order, and shall become inoperative if an unappealable federal court judgment or decision becomes final that holds that paragraph invalid, to the extent of the invalidity.

(h) The director shall not knowingly disclose information submitted to the state by an applicant or registrant pursuant to Article 4 (commencing with Section 12811) of Chapter 2 of Division 7 of the Food and Agricultural Code to any officer, employee, or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in countries in addition to the United States, or to any other person who intends to deliver this information to any foreign or multinational business or entity, unless the applicant or registrant consents to the disclosure. To implement this subdivision, the director shall require the following affirmation to be signed by the person who requests such information:

AFFIRMATION OF STATUS

This affirmation is required by Section 6254.2 of the Government Code.

I have requested access to information submitted to the Department of Pesticide Regulation (or previously submitted to the Department of Food and Agriculture) by a pesticide applicant or registrant pursuant to the California Food and Agricultural Code. I hereby affirm all of the following statements:

(1) I do not seek access to the information for purposes of delivering it or offering it for sale to any business or other entity, including the business or entity of which I am an officer, employee, or agent engaged in the production, sale, or distribution of pesticides in countries other than the United States or in countries in addition to the United States; or to the officers, employees, or agents of such a business or entity.

(2) I will not purposefully deliver or negligently cause the data to be delivered to a business or entity specified in paragraph (1) or its officers, employees, or agents.

I am aware that I may be subject to criminal penalties under Section 118 of the Penal Code if I make any statement of material facts knowing that the statement is false or if I willfully conceal any material fact.

Name of Requester	Name of Requester's Organization
Signature of Requester	Address of Requester
Date / Request No.	Telephone Number of Requester
Name, Address, and Telephone Number of Requester's Client, if the requester has requested access to the information on behalf of someone other than the requester or the requester's organization listed above.	

(i) Notwithstanding any other provision of this section, the director may disclose information submitted by an applicant or registrant to any person in connection with a public proceeding conducted under law or regulation, if the director determines that the information is needed to determine whether a pesticide, or any ingredient of any pesticide, causes unreasonable adverse effects on health or the environment.

(j) The director shall maintain records of the names of persons to whom data is disclosed pursuant to this section and the persons or organizations they represent and shall inform the applicant or registrant of the names and the affiliation of these persons.

(k) Section 118 of the Penal Code applies to any affirmation made pursuant to this section.

(l) Any officer or employee of the state or former officer or employee of the state who, because of this employment or official position, obtains possession of, or has access to, material which is prohibited from disclosure by this section, and who, knowing that disclosure of this material is prohibited by this section, willfully discloses the material in any manner to any person not entitled to receive it, shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment.

For purposes of this subdivision, any contractor with the state who is furnished information pursuant to this section, or any employee of any contractor, shall be considered an employee of the state.

(m) This section does not prohibit any person from maintaining a civil action for wrongful disclosure of trade secrets.

(n) The director may limit an individual to one request per month pursuant to this section if the director determines that a person has made a frivolous request within the past 12-month period.

(Amended by Stats. 1995, Ch. 435, Sec. 10. Effective January 1, 1997. Conditionally inoperative as provided in subd. (g).)

§254.3. (a) The home addresses and home telephone numbers of state employees and employees of a school district or county office of education shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:

(1) To an agent, or a family member of the individual to whom the information pertains.

(2) To an officer or employee of another state agency, school district, or county office of education when necessary for the performance of its official duties.

(3) To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed.

(4) To an agent or employee of a health benefit plan providing health services or administering claims for health services to state, school districts, and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents.

(b) Upon written request of any employee, a state agency, school district, or county office of education shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and an agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

(Amended by Stats. 1992, Ch. 463, Sec. 1. Effective August 10, 1992.)

§254.4. (a) The home address, telephone number, e-mail address, precinct number, or other number specified by the Secretary of State for voter registration purposes, and prior registration information shown on the voter registration card for all registered voters, are confidential and shall not be disclosed to any person, except pursuant to Section 2194 of the Elections Code.

(b) For purposes of this section, "home address" means street address only, and does not include an individual's city or post office address.

(c) The California driver's license number, the California identification card number, the social security number, and any other unique identifier used by the State of California for purposes of voter identification shown on a voter registration card of a registered voter, or added to the voter registration records to comply with the requirements of the Help America Vote Act of 2002 (42 U.S.C. Sec. 15301 et seq.), are confidential and shall not be disclosed to any person.

(d) The signature of the voter that is shown on the voter registration card is confidential and shall not be disclosed to any person.

(Amended by Stats. 2005, Ch. 726, Sec. 13. Effective January 1, 2006.)

§254.5. Notwithstanding any other provisions of this law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. For purposes of this section, "agency" includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment.

This section, however, shall not apply to disclosures:

(a) Made pursuant to the Information Practices Act (commencing with Section 1798 of the Civil Code) or discovery proceedings.

(b) Made through other legal proceedings or as otherwise required by law.

(c) Within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes.

(d) Not required by law, and prohibited by formal action of an elected legislative body of the local agency which retains the writings.

(e) Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law.

(f) Of records relating to a financial institution or an affiliate thereof, if the disclosures are made to the financial institution or affiliate by a state agency responsible for the regulation or supervision of the financial institution or affiliate.

(g) Of records relating to any person that is subject to the jurisdiction of the Department of Corporations, if the disclosures are made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department of Corporations.

(h) Made by the Commissioner of Financial Institutions under Section 280, 282, 8009, or 18396 of the Financial Code.

(i) Of records relating to any person that is subject to the jurisdiction of the Department of Managed Health Care, if the disclosures

ore made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department of Managed Health Care.

(Amended by Stats. 2008, Ch. 510, Sec. 23. Effective January 1, 2009.)

6268.8. Whenever a city and county or a joint powers agency, pursuant to a mandatory statute or charter provision to collect private industry wage data for salary setting purposes, or a contract entered to implement that mandate, is provided this data by the federal Bureau of Labor Statistics on the basis that the identity of private industry employers shall remain confidential, the identity of the employers shall not be open to the public or be admitted as evidence in any action or special proceeding.

(Added by Stats. 1987, Ch. 1478, Sec. 1.)

6268.7. (a) All information, analyses, plans, or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce, which any air pollution control district or air quality management district, or any other state or local agency or district, requires any applicant to provide before the applicant builds, erects, alters, replaces, operates, sells, rents, or uses the article, machine, equipment, or other contrivance, are public records.

(b) All air or other pollution monitoring data, including data compiled from stationary sources, are public records.

(c) All records of notices and orders directed to the owner of any building of violations of housing or building codes, ordinances, statutes, or regulations which constitute violations of standards provided in Section 1941.1 of the Civil Code, and records of subsequent action with respect to those notices and orders, are public records.

(d) Except as otherwise provided in subdivision (e) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, trade secrets are not public records under this section. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

(e) Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are used to calculate emission data are not public records.

(f) Data used to calculate the costs of obtaining emissions offsets are not public records. At the time that an air pollution control district or air quality management district issues a permit to construct to an applicant who is required to obtain offsets pursuant to district rules and regulations, data obtained from the applicant consisting of the year the offset transaction occurred, the amount of offsets purchased, by pollutant, and the total cost, by pollutant, of the offsets purchased is a public record. If an application is denied, the data shall not be a public record.

(Amended by Stats. 1992, Ch. 612, Sec. 1. Effective January 1, 1993.)

6268.6. Every employment contract between a state or local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255.

(Added by Stats. 1974, Ch. 1298.)

6268.5. (a) Computer software developed by a state or local agency is not itself a public record under this chapter. The agency may sell, lease, or license the software for commercial or noncommercial use.

(b) As used in this section, "computer software" includes computer mapping systems, computer programs, and computer graphics systems.

(c) This section shall not be construed to create an implied warranty on the part of the State of California or any local agency for errors, omissions, or other defects in any computer software as provided pursuant to this section.

(d) Nothing in this section is intended to affect the public record status of information merely because it is stored in a computer. Public records stored in a computer shall be disclosed as required by this chapter.

(e) Nothing in this section is intended to limit any copyright protections.

(Added by Stats. 1988, Ch. 447, Sec. 2.)

6268.10. Nothing in this chapter requires disclosure of records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency.

(Amended by Stats. 2009, Ch. 879, Sec. 2. Effective October 7, 2009.)

6268.11. Nothing in this chapter requires the disclosure of records that relate to volatile organic compounds or chemical substances information received or compiled by an air pollution control officer pursuant to Section 42303.2 of the Health and Safety Code.

(Added by Stats. 1991, Ch. 902, Sec. 1.)

6268.12. Any information reported to the North American Securities Administrators Association/National Association of Securities Dealers' Central Registration Depository and compiled as disciplinary records which are made available to the Department of

Corporations through a computer system, shall constitute a public record. Notwithstanding any other provision of law, the Department of Corporations may disclose that information and the current license status and the year of issuance of the license of a broker-dealer upon written or oral request pursuant to Section 25247 of the Corporations Code.

(Added by Stats. 1993, Ch. 459, Sec. 12. Effective January 1, 1994.)

6268.13. Notwithstanding Section 6254, upon the request of any Member of the Legislature or upon request of the Governor or his or her designee, test questions or materials that would be used to administer an examination are and provided by the State Department of Education and administered as part of a statewide testing program of pupils enrolled in the public schools shall be disclosed to the requester. These questions or materials may not include an individual examination that has been so administered to a pupil and scored. The requester may not take physical possession of the questions or materials, but may view the questions or materials at a location selected by the department. Upon viewing this information, the requester shall keep the materials that he or she has seen confidential.

(Added by Stats. 1995, Ch. 777, Sec. 3. Effective January 1, 1996.)

6268.14. (a) (1) Except as provided in Sections 6254 and 6254.7, nothing in this chapter shall be construed to require disclosure of records of the Department of Corrections and Rehabilitation that relate to health care services contract negotiations, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations, including, but not limited to, records related to those negotiations such as meeting minutes, research, work product, theories, or strategy of the department, or its staff, or members of the California Medical Assistance Commission, or its staff, who act in consultation with, or on behalf of, the department.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health services entered into by the Department of Corrections and Rehabilitation or the California Medical Assistance Commission on or after July 1, 1993, shall be open to inspection one year after they are fully executed. In the event that a contract for health services that is entered into prior to July 1, 1993, is amended on or after July 1, 1993, the amendment, except for any portion containing rates of payment, shall be open to inspection one year after it is fully executed.

(3) Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, including, but not limited to, Section 1040 of the Evidence Code, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee, the California State Auditor's Office, and the Legislative Analyst's Office. The Joint Legislative Audit Committee, the California State Auditor's Office, and the Legislative Analyst's Office shall maintain the confidentiality of the contracts and amendments until the contract or amendment is fully open to inspection by the public.

(5) It is the intent of the Legislature that confidentiality of health care provider contracts, and of the contracting process as provided in this subdivision, is intended to protect the competitive nature of the negotiations process, and shall not affect public access to other information relating to the delivery of health care services.

(b) The inspection authority and confidentiality requirements established in subdivisions (a), (c), and (r) of Section 6254 for the Legislative Audit Committee shall also apply to the California State Auditor's Office and the Legislative Analyst's Office.

(Amended by Stats. 2012, Ch. 181, Sec. 3. Effective January 1, 2013.)

6254.15. Nothing in this chapter shall be construed to require the disclosure of records that are any of the following: corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California. Except as provided below, incentives offered by state or local government agencies, if any, shall be disclosed upon communication to the agency or the public of a decision to stay, locate, relocate, or expand, by a company, or upon application by that company to a governmental agency for a general plan amendment, rezone, use permit, building permit, or any other permit, whichever occurs first.

The agency shall delete, prior to disclosure to the public, information that is exempt pursuant to this section from any record describing state or local incentives offered by an agency to a private business to retain, locate, relocate, or expand the business within California.

(Added by Stats. 1995, Ch. 733, Sec. 1. Effective January 1, 1996.)

6254.16. Nothing in this chapter shall be construed to require the disclosure of the name, credit history, utility usage data, home address, or telephone number of utility customers of local agencies, except that disclosure of name, utility usage data, and the home address of utility customers of local agencies shall be made available upon request as follows:

(a) To an agent or authorized family member of the person to whom the information pertains.

(b) To an officer or employee of another governmental agency when necessary for the performance of its official duties.

(c) Upon court order or the request of a law enforcement agency relative to an ongoing investigation.

(d) Upon determination by the local agency that the utility customer who is the subject of the request has used utility services in a manner inconsistent with applicable local utility usage policies.

(e) Upon determination by the local agency that the utility customer who is the subject of the request is an elected or appointed official with authority to determine the utility usage policies of the local agency, provided that the home address of an appointed official shall not be disclosed without his or her consent.

(f) Upon determination by the local agency that the public interest in disclosure of the information clearly outweighs the public interest in nondisclosure.

(Added by Stats. 1987, Ch. 376, Sec. 1. Effective January 1, 1988.)

6254.17. (a) Nothing in this chapter shall be construed to require disclosure of records of the California Victim Compensation and Government Claims Board that relate to a request for assistance under Article 1 (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2.

(b) This section shall not apply to a disclosure of the following information, if no information is disclosed that connects the information to a specific victim, derivative victim, or applicant under Article 1 (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2:

(1) The amount of money paid to a specific provider of services.

(2) Summary data concerning the types of crimes for which assistance is provided.

(Amended by Stats. 2004, Ch. 183, Sec. 135. Effective January 1, 2005.)

6254.18. (a) Nothing in this chapter shall be construed to require disclosure of any personal information received, collected, or compiled by a public agency regarding the employees, volunteers, board members, owners, partners, officers, or contractors of a reproductive health services facility who have notified the public agency pursuant to subdivision (d) if the personal information is contained in a document that relates to the facility.

(b) For purposes of this section, the following terms have the following meanings:

(1) "Contractor" means an individual or entity that contracts with a reproductive health services facility for services related to patient care.

(2) "Personal information" means the following information related to an individual that is maintained by a public agency: social security number, physical description, home address, home telephone number, statements of personal worth or personal financial data filed pursuant to subdivision (n) of Section 6254, personal medical history, employment history, electronic mail address, and information that reveals any electronic network location or identity.

(3) "Public agency" means all of the following:

(A) The State Department of Health Care Services.

(B) The Department of Consumer Affairs.

(C) The Department of Managed Health Care.

(D) The State Department of Public Health.

(4) "Reproductive health services facility" means the office of a licensed physician and surgeon whose specialty is family practice, obstetrics, or gynecology, or a licensed clinic, where at least 20 percent of the patients of the physician or the clinic are provided with family planning or abortion services.

(c) Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to obtain access to employment history information pursuant to Sections 6258 and 6259. If the court finds, based on the facts of a particular case, that the public interest served by disclosure of employment history information clearly outweighs the public interest served by not disclosing the information, the court shall order the officer or person charged with withholding the information to disclose employment history information or show cause why he or she should not do so pursuant to Section 6259.

(d) In order for this section to apply to an individual who is an employee, volunteer, board member, officer, or contractor of a reproductive health services facility, the individual shall notify the public agency to which his or her personal information is being submitted or has been submitted that he or she falls within the application of this section. The reproductive health service facility shall attach a copy of all notifications submitted pursuant to this section. This notification shall be valid if it complies with all of the following:

(1) Is on the official letterhead of the facility.

(2) Is clearly separate from any other language present on the same page and is executed by a signature that serves no other purpose than to execute the notification.

(3) Is signed and dated by both of the following:

(A) The individual whose information is being submitted.

(B) The executive officer or his or her designee of the reproductive health services facility.

(e) The privacy protections for personal information authorized pursuant to this section shall be effective from the time of notification pursuant to subdivision (d) until either one of the following occurs:

(1) Six months after the date of separation from a reproductive health services facility for an individual who has served for not more than one year as an employee, contractor, volunteer, board member, or officer of the reproductive health services facility.

(2) One year after the date of separation from a reproductive health services facility for an individual who has served for more than one year as an employee, contractor, volunteer, board member, or officer of the reproductive health services facility.

(f) Within 90 days of separation of an employee, contractor, volunteer, board member, or officer of the reproductive health services facility who has provided notice to a public agency pursuant to subdivision (d), the facility shall provide notice of the separation to the relevant agency or agencies.

(g) Nothing in this section shall prevent the disclosure by a government agency of data regarding age, race, ethnicity, national origin, or gender of individuals whose personal information is protected pursuant to this section, so long as the data do not name no individually identifiable information.

(Amended by Stats. 2006, Ch. 241, Sec. 3. Effective January 1, 2007. Operative July 1, 2007, by Sec. 37 of Ch. 241.)

6254.19. Nothing in this chapter shall be construed to require the disclosure of an information security record of a public agency, if, on the facts of the particular case, disclosure of that record would reveal vulnerabilities to, or otherwise increase the potential for an attack on, an information technology system of a public agency. Nothing in this section shall be construed to limit public disclosure of records stored within an information technology system of a public agency that are not otherwise exempt from disclosure pursuant to this chapter or any other provision of law.

(Added by Stats. 2010, Ch. 245, Sec. 1. Effective January 1, 2011.)

6254.20. Nothing in this chapter shall be construed to require the disclosure of records that relate to electronically collected personal information, as defined by Section 11015.5, received, collected, or compiled by a state agency.

(Added by Stats. 1998, Ch. 429, Sec. 2. Effective January 1, 1999.)

6254.21. (a) No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual.

(b) No person shall knowingly post the home address or telephone number of any elected or appointed official, or of the official's residing spouse or child, on the Internet knowing that person is an elected or appointed official and intending to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm to that individual. A violation of this subdivision is a misdemeanor. A violation of this subdivision that leads to the bodily injury of the official, or his or her residing spouse or child, is a misdemeanor or a felony.

(c) (1) (A) No person, business, or association shall publicly post or publicly display on the Internet the home address or telephone number of any elected or appointed official if that official has made a written demand of that person, business, or association to not disclose his or her home address or telephone number.

(B) A written demand made under this paragraph by a state constitutional officer, a mayor, or a Member of the Legislature, a city council, or a board of supervisors shall include a statement describing a threat or fear for the safety of that official or of any person residing at the official's home address.

(C) A written demand made under this paragraph by an elected official shall be effective for four years, regardless of whether or not the official's term has expired prior to the end of the four-year period.

(D) (i) A person, business, or association that receives the written demand of an elected or appointed official pursuant to this paragraph shall remove the official's home address or telephone number from public display on the Internet, including information provided to cellular telephone applications, within 48 hours of delivery of the written demand, and shall continue to ensure that this information is not reposted on the same Internet Web site, subsidiary site, or any other Internet Web site maintained by the recipient of the written demand.

(ii) After receiving the elected or appointed official's written demand, the person, business, or association shall transfer the appointed or elected official's home address or telephone number to any other person, business, or association through any other medium.

(iii) Clause (i) shall not be deemed to prohibit a telephone corporation, as defined in Section 234 of the Public Utilities Code, or its affiliate, from transferring the elected or appointed official's home address or telephone number to any person, business, or association, if the transfer is authorized by federal or state law, regulation, order, or tariff, or necessary in the event of an emergency, or to collect a debt owed by the elected or appointed official to the telephone corporation or its affiliate.

(E) For purposes of this paragraph, "publicly post" or "publicly display" means to intentionally communicate or otherwise make available to the general public.

(2) An official whose home address or telephone number is made public as a result of a violation of paragraph (1) may bring an action seeking injunctive or declarative relief in any court of competent jurisdiction. If a court finds that a violation has occurred, it may grant injunctive or declarative relief and shall award the official court costs and reasonable attorney's fees. A fine not exceeding one thousand dollars ($1,000) may be imposed for a violation of the court's order for an injunction or declarative relief obtained pursuant to this paragraph.

(3) An elected or appointed official may designate in writing the official's employer, a related governmental entity, or any voluntary professional association of similar officials to act, on behalf of that official, as that official's agent with regard to making a written demand pursuant to this section. A written demand made by an agent pursuant to this paragraph shall include a statement describing a threat or fear for the safety of that official or of any person residing at the official's home address.

(d) (1) No person, business, or association shall solicit, sell, or trade on the Internet the home address or telephone number of an elected or appointed official with the intent to cause imminent great bodily harm to the official or to any person residing at the official's home address.

(2) Notwithstanding any other law, an official whose home address or telephone number is solicited, sold, or traded in violation of paragraph (1) may bring an action in any court of competent jurisdiction. If a jury or court finds that a violation has occurred, it shall award damages to that official in an amount up to a maximum of three times the actual damages but in no case less than four thousand dollars ($4,000).

(e) An interactive computer service or access software provider, as defined in Section 230(f) of Title 47 of the United States Code, shall not be liable under this section unless the service or provider intends to abet or cause imminent great bodily harm that is likely to occur or threatens to cause imminent great bodily harm to an elected or appointed official.

(f) For purposes of this section, "elected or appointed official" includes, but is not limited to, all of the following:

(1) State constitutional officers.

(2) Members of the Legislature.

(3) Judges and court commissioners.

(4) District attorneys.
(5) Public defenders.
(6) Members of a city council.
(7) Members of a board of supervisors.
(8) Appointees of the Governor.
(9) Appointees of the Legislature.
(10) Mayors.
(11) City attorneys.
(12) Police chiefs and sheriffs.
(13) A public safety official, as defined in Section 6254.24.
(14) State administrative law judges.
(15) Federal judges and federal defenders.
(16) Members of the United States Congress and appointees of the President.

(g) Nothing in this section is intended to preclude punishment instead under Sections 69, 76, or 422 of the Penal Code, or any other provision of law.
(Amended by Stats. 2010, Ch. 194, Sec. 1. Effective January 1, 2011.)

6254.22. Nothing in this chapter or any other provision of law shall require the disclosure of records of a health plan that is licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code) and that is governed by a county board of supervisors, whether paper records, records maintained in the management information system, or records in any other form, that relate to provider rate or payment determinations, allocation or distribution methodologies for provider payments, formulas or calculations for these payments, and contract negotiations with providers of health care for alternative rates for a period of three years after the contract is fully executed. The transmission of the records, or the information contained therein in an alternative form, to the board of supervisors shall not constitute a waiver of exemption from disclosure, and the records and information once transmitted to the board of supervisors shall be subject to this same exemption. The provisions of this section shall not prevent access to any records by the Joint Legislative Audit Committee in the exercise of its powers pursuant to Article 1 (commencing with Section 10500) of Chapter 4 of Part 2 of Division 2 of Title 2. The provisions of this section also shall not prevent access to any records by the Department of Corporations in the exercise of its powers pursuant to Article 1 (commencing with Section 1340) of Chapter 2.2 of Division 2 of the Health and Safety Code.
(Added by Stats. 1999, Ch. 769, Sec. 1. Effective January 1, 2000.)

6254.23. Nothing in this chapter or any other provision of law shall require the disclosure of a risk assessment or railroad infrastructure protection program filed with the Public Utilities Commission, the Director of Homeland Security, and the Office of Emergency Services pursuant to Article 7.3 (commencing with Section 7665) of Chapter 1 of Division 4 of the Public Utilities Code.
(Amended by Stats. 2013, Ch. 352, Sec. 107. Effective September 26, 2013. Operative July 1, 2013, by Sec. 543 of Ch. 352.)

6254.24. As used in this chapter, "public safety official" means the following parties, whether active or retired:

(a) A peace officer as defined in Sections 830 to 830.65, inclusive, of the Penal Code, or a person who is not a peace officer, but may exercise the powers of arrest during the course and within the scope of their employment pursuant to Section 830.7 of the Penal Code.

(b) A public officer or other person listed in Sections 1808.2 and 1808.6 of the Vehicle Code.

(c) An "elected or appointed official" as defined in subdivision (f) of Section 6254.21.

(d) An attorney employed by the Department of Justice, the State Public Defender, or a county office of the district attorney or public defender, the United States Attorney, or the Federal Public Defender.

(e) A city attorney and an attorney who represent cities in criminal matters.

(f) An employee of the Department of Corrections and Rehabilitation who supervises inmates or is required to have a prisoner in his or her care or custody.

(g) A sworn or nonsworn employee who supervises inmates in a city police department, a county sheriff's office, the Department of the California Highway Patrol, federal, state, or a local detention facility, and a local juvenile hall, camp, ranch, or home, and a probation officer as defined in Section 830.5 of the Penal Code.

(h) A federal prosecutor, a federal criminal investigator, and a National Park Service Ranger working in California.

(i) The surviving spouse or child of a peace officer defined in Section 830 of the Penal Code, if the peace officer died in the line of duty.

(j) State and federal judges and court commissioners.

(k) All employees of the Attorney General, a district attorney, or a public defender who submits verification from the Attorney General, district attorney, or public defender that the employee represents the Attorney General, district attorney, or public defender in matters that routinely place that employee in personal contact with persons under investigation for, charged with, or convicted of, committing criminal acts.

(l) A nonsworn employee of the Department of Justice or a police department or sheriff's office that, in the course of his or her employment, is responsible for collecting, documenting, and preserving physical evidence at crime scenes, testifying in court as an

expert witness, and other technical duties, and a nonsworn employee that, in the course of his or her employment, performs a variety of standardized and advanced laboratory procedures in the examination of physical crime evidence, determines their results, and provides expert testimony in court.
(Amended by Stats. 2010, Ch. 194, Sec. 2. Effective January 1, 2011.)

6254.25. Nothing in this chapter or any other provision of law shall require the disclosure of a memorandum submitted to a state body or to the legislative body of a local agency by its legal counsel pursuant to subdivision (a) of Section 11126 or Section 54956.9 until the pending litigation has been finally adjudicated or otherwise settled. The memorandum shall be protected by the attorney work-product privilege until the pending litigation has been finally adjudicated or otherwise settled.
(Amended by Stats. 1997, Ch. 1320, Sec. 1.)

6254.26. (a) Notwithstanding any provision of this chapter or other law, the following records regarding alternative investments in which public investment funds invest shall not be subject to disclosure pursuant to this chapter, unless the information has already been publicly released by the keeper of the information:

(1) Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle.

(2) Quarterly and annual financial statements of alternative investment vehicles.

(3) Meeting materials of alternative investment vehicles.

(4) Records containing information regarding the portfolio positions in which alternative investment funds invest.

(5) Capital call and distribution notices.

(6) Alternative investment agreements and all related documents.

(b) Notwithstanding subdivision (a), the following information contained in records described in subdivision (a) regarding alternative investments in which public investment funds invest shall be subject to disclosure pursuant to this chapter and shall not be considered a trade secret exempt from disclosure:

(1) The name, address, and vintage year of each alternative investment vehicle.

(2) The dollar amount of the commitment made to each alternative investment vehicle by the public investment fund since inception.

(3) The dollar amount of cash contributions made by the public investment fund to each alternative investment vehicle since inception.

(4) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund from each alternative investment vehicle.

(5) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.

(6) The net internal rate of return of each alternative investment vehicle since inception.

(7) The investment multiple of each alternative investment vehicle since inception.

(8) The dollar amount of the total management fees and costs paid on an annual fiscal yearend basis, by the public investment fund to each alternative investment vehicle.

(9) The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal year-end basis.

(c) For purposes of this section, the following definitions shall apply:

(1) "Alternative investment" means an investment in a private equity fund, venture fund, hedge fund, or absolute return fund.

(2) "Alternative investment vehicle" means the limited partnership, limited liability company, or similar legal structure through which the public investment fund invests in portfolio companies.

(3) "Portfolio positions" means individual portfolio investments made by the alternative investment vehicles.

(4) "Public investment fund" means any public pension or retirement system, and any public endowment or foundation.
(Amended by Stats. 2006, Ch. 538, Sec. 233. Effective January 1, 2007.)

6254.27. Nothing in this chapter shall be construed to require the disclosure by a county recorder of any "official record" if a "public record" version of that record is available pursuant to Article 3.5 (commencing with Section 27300) of Chapter 6 of Part 3 of Division 2 of Title 3.
(Added by Stats. 2007, Ch. 627, Sec. 4. Effective January 1, 2008.)

6254.28. Nothing in this chapter shall be construed to require the disclosure by a filing office of any "official record" if a "public record" version of that record is available pursuant to Section 9526.5 of the Commercial Code.
(Added by Stats. 2007, Ch. 627, Sec. 5. Effective January 1, 2008.)

6254.29. (a) It is the intent of the Legislature that, in order to protect against the risk of identity theft, local agencies shall redact social security numbers from records before disclosing them to the public pursuant to this chapter.

(b) Nothing in this chapter shall be construed to require a local agency to disclose a social security number.

(c) This section shall not apply to records maintained by a county recorder.
(Added by Stats. 2007, Ch. 627, Sec. 6. Effective January 1, 2008.)

6254.23. A state or local law enforcement agency shall not require a victim of an incident, or an authorized representative thereof, to show proof of the victim's legal presence in the United States in order to obtain the information required to be disclosed by that law enforcement agency pursuant to subdivision (f) of Section 6254. However, if, for identification purposes, a state or local law enforcement agency requires identification in order for a victim of an incident, or an authorized representative thereof, to obtain that information, the agency shall, at a minimum, accept a current driver's license or identification card issued by any state in the United States, a current passport issued by the United States or a foreign government with which the United States has a diplomatic relationship, or a current Matricula Consular card.

(Added by Stats. 2013, Ch. 272, Sec. 1. Effective January 1, 2014.)

6255. (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

(b) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

(Amended by Stats. 2000, Ch. 982, Sec. 3. Effective January 1, 2001.)

6257.5. This chapter does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.

(Added by Stats. 1998, Ch. 1049, Sec. 1. Effective January 1, 1999.)

6259. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.

(Amended by Stats. 1990, Ch. 908, Sec. 1.)

6259. (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.

(b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.

(c) In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be cited to show cause why he or she is not in contempt of court.

(d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

(Amended by Stats. 1993, Ch. 926, Sec. 10. Effective January 1, 1994.)

6260. The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state, nor to limit or impair any rights of discovery in a criminal case.

(Amended by Stats. 1976, Ch. 314.)

6262. Notwithstanding Section 6252, an itemized statement of the total expenditures and disbursement of any agency provided for in Article VI of the California Constitution shall be open for inspection.

(Added by Stats. 1975, Ch. 1246.)

6263. The exemption of records of complaints to, or investigations conducted by, any state or local agency for licensing purposes under subdivision (f) of Section 6254 shall not apply when a request for inspection of such records is made by a district attorney.

(Added by Stats. 1979, Ch. 661.)

6263. A state or local agency shall allow an inspection or copying of any public record or class of public records not exempted by this chapter when requested by a district attorney.

(Added by Stats. 1979, Ch. 661.)

6265. The district attorney may petition a court of competent jurisdiction to require a state or local agency to allow him to inspect or receive a copy of any public record or class of public records not exempted by this chapter when the agency fails or refuses to allow inspection or copying within 10 working days of a request. The court may require a public agency to permit inspection or copying by the district attorney unless the public interest or good cause is withheld by such records clearly outweighs the public interest in disclosure.

(Added by Stats. 1979, Ch. 661.)

6270. Disclosure of records to a district attorney under the provisions of this chapter shall effect no change in the status of the records under any other provision of law.

(Added by Stats. 1979, Ch. 661.)

6267. All patron use records of any library which is in whole or in part supported by public funds shall remain confidential and shall not be disclosed by a public agency, or private actor that maintains or stores patron use records on behalf of a public agency, to any person, local agency, or state agency except as follows:

(a) By a person acting within the scope of his or her duties within the administration of the library.

(b) By a person authorized, in writing, by the individual to whom the records pertain, to inspect the records.

(c) By order of the appropriate superior court.

As used in this section, the term "patron use records" includes the following:

(1) Any written or electronic record, that is used to identify the patron, including, but not limited to, a patron's name, address, telephone number, or e-mail address, that a library patron provides in order to become eligible to borrow or use books and other materials.

(2) Any written record or electronic transaction that identifies a patron's borrowing information or use of library information resources, including, but not limited to, database search records, borrowing records, class records, and any other personally identifiable uses of library resources information requests, or inquiries.

This section shall not apply to statistical reports of patron use nor to records of fines collected by the library.

(Amended by Stats. 2011, Ch. 80, Sec. 1. Effective January 1, 2012.)

6275. Public records, as defined in Section 6252, in the custody or control of the Governor when he or she leaves office, either voluntarily or involuntarily, shall, as soon as is practical, be transferred to the State Archives. Notwithstanding any other provision of law, the Governor, by written instrument, the terms of which shall be made public, may restrict public access to any of the transferred public records, or any other writings he or she may transfer, which have not already been made accessible to the public. With respect to public records, public access, as otherwise provided for by this chapter, shall not be restricted for a period greater than 50 years or the death of the Governor, whichever is later, nor shall there be any restriction whatsoever with respect to enrolled bill files, press releases, speech files, or writings relating to applications for clemency or extradition in cases which have been closed for a period of at least 25 years. Subject to any restrictions permitted by this section, the Secretary of State, as custodian of the State Archives, shall make all such public records and other writings available to the public as otherwise provided for in this chapter.

Except as to enrolled bill files, press releases, speech files, or writings relating to applications for clemency or extradition, this section shall not apply to public records or other writings in the direct custody or control of any Governor who held office between 1974 and 1988 at the time of leaving office, except to the extent that that Governor may voluntarily transfer those records or other writings to the State Archives.

Notwithstanding any other provision of law, the public records and other writings of any Governor who held office between 1974 and 1988 may be transferred to any educational or research institution in California provided that with respect to public records, public access, as otherwise provided for by this chapter, shall not be restricted for a period greater than 50 years or the death of the Governor, whichever is later. No records or writings may be transferred pursuant to this paragraph unless the institution receiving them agrees to maintain, and does maintain, the materials according to commonly accepted archival standards. No public records transferred shall be destroyed by that institution without first receiving the written approval of the Secretary of State, as custodian of the State Archives, who may require that the records be placed in the State Archives rather than being destroyed. An institution receiving those records or writings shall allow the Secretary of State, as custodian of the State Archives, to copy, at state expense, and to make available to the public, any and all public records, and inventories, indices, or finding aids relating to those records, which the institution makes available to the public generally. Copies of those records in the custody of the State Archives shall be given the same legal effect as is given to the originals.

(Added by Stats. 1980, Ch. 202, Sec. 2.)

6276. (a) Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency from providing the record directly pursuant to this chapter. Nothing in this section requires a state or local agency to use the State Printer to print public records. Nothing in this section prevents the destruction of records pursuant to law.

(b) This section shall not apply to contracts entered into prior to January 1, 1996, between the County of Santa Clara and a private entity for the provision of public records subject to disclosure under this chapter.

(Added by Stats. 1995, Ch. 108, Sec. 1. Effective January 1, 1996.)

ARTICLE 2. Other Exemptions from Disclosure [6276 - 6276.48] *(Article 2 added by Stats. 1998, Ch. 620, Sec. 11.)*

6276. It is the intent of the Legislature to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any info rmation contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article pursuant to a bill authorized by a standing committee of the Legislature to be introduced during the first year of each session of the Legislature. The statutes and constitutional provisions listed in this article may operate to exempt certain records, or portions thereof, from disclosure. The statutes and constitutional provisions listed and described may not be inclusive of all exemptions. The listing of a statute or constitutional provision in this article does not itself create an exemption. Requesters of public records and public agencies are cautioned to review the applicable statute or constitutional provision to determine the extent to which, in light of the circumstances surrounding the request, exempts public records from disclosure.
(Amended by Stats. 2012, Ch. 607, Sec. 2. Effective January 1, 2013.)

6276. Records or information not required to be disclosed pursuant to subdivision (k) of Section 6254 may include, but shall not be limited to, records or information identified in statutes listed in this article.
(Added by Stats. 2008, Ch. 620, Sec. 11. Effective January 1, 2009.)

6276.01. Crime victims, confidential information or records, The Victims' Bill of Rights Act of 2008: Marsy's Law, Section 28 of Article I of the California Constitution.
(Added by Stats. 2012, Ch. 607, Sec. 3. Effective January 1, 2013.)

6276.02. Acquired Immune Deficiency Syndrome, blood test results, written authorization not necessary for disclosure, Section 121010, Health and Safety Code.

Acquired Immune Deficiency Syndrome, blood test subject, compelling identity of, Section 120075, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of personal data of patients in State Department of Public Health programe, Section 120820, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of research records, Sections 121000, 121005, 121115, and 121120, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of vaccine volunteers, Section 121280, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of information obtained in prevention programe at correctional facilities and law enforcement agencies, Sections 7512 and 7514, Penal Code.

Acquired Immune Deficiency Syndrome, confidentiality of test results of person convicted of prostitution, Section 1202.6, Penal Code.

Acquired Immune Deficiency Syndrome, disclosure of results of HIV test, penalties, Section 120980, Health and Safety Code.

Acquired Immune Deficiency Syndrome, personal information, insurers tests, confidentiality of, Section 790, Insurance Code.

Acquired Immune Deficiency Syndrome, public safety and testing disclosure, Sections 121065 and 121070, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, production or discovery of records for use in criminal or civil proceedings against subject prohibited, Section 121100, Health and Safety Code.

Acquired Immune Deficiency Syndrome Public Health Records Confidentiality Act, personally identifying information confidentiality, Section 121025, Health and Safety Code.

Acquired Immune Deficiency Syndrome, test of criminal defendant pursuant to search warrant requested by victim, confidentiality of, Section 1524.1, Penal Code.

Acquired Immune Deficiency Syndrome, test results, disclosure to patient's spouse and others, Section 121015, Health and Safety Code.

Acquired Immune Deficiency Syndrome, test of person under Youth Authority, disclosure of results, Section 1768.8, Welfare and Institutions Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, financial audits or program evaluations, Section 121085, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, violations, Section 121100, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, personally identifying research records not to be disclosed, Section 121075, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, permitted disclosure, Section 121080, Health and Safety Code.

Administrative procedure, adjudicatory hearings, interpreters, Section 11513.

Adoption records, confidentiality of, Section 102730, Health and Safety Code.

Advance Health Care Directive Registry, exemption from disclosure for registration information provided to the Secretary of State, subdivision (m), Section 4234.
(Amended by Stats. 2009, Ch. 584, Sec. 3. Effective January 1, 2010.)

6276.04. Aeronautics Act, reports of investigations and hearings, Section 21693, Public Utilities Code.

Agricultural producers marketing, access to records, Section 50616, Food and Agricultural Code.

Aiding disabled voters, Section 14282, Elections Code.

Air pollution data, confidentiality of trade secrets, Section 6254.7, and Sections 42303.2 and 43206, Health and Safety Code.

Air toxics emissions inventory plans, protection of trade secrets, Section 44346, Health and Safety Code.

Alcohol and drug abuse records and records of communicable diseases, confidentiality of, Section 123125, Health and Safety Code.

Alcoholic beverage licensees, confidentiality of corporate proprietary information, Section 25205, Business and Professions Code.

Ambulatory Surgery Data Record, confidentiality of identifying information, Section 128737, Health and Safety Code.

Apiary registration information, confidentiality of, Section 29041, Food and Agricultural Code.

Archaeological site information and reports maintained by state and local agencies, disclosure not required, Section 6254.10.

Arrest not resulting in conviction, disclosure or use of records, Sections 432.7 and 432.8, Labor Code.

Arsonists, registered, confidentiality of certain information, Section 457.1, Penal Code.

Artificial insemination, donor not natural father, confidentiality of records, Section 7613, Family Code.

Assessor's records, confidentiality of information in, Section 408, Revenue and Taxation Code.

Assessor's records, confidentiality of information in, Section 451, Revenue and Taxation Code.

Assessor's records, display of documents relating to business affairs or property of another, Section 408.2, Revenue and Taxation Code.

Assigned risk plans, rejected applicants, confidentiality of information, Section 11624, Insurance Code.

Attorney applicant, investigation by State Bar, confidentiality of, Section 6060.2, Business and Professions Code.

Attorney-client confidential communication, Section 6068, Business and Professions Code, and Sections 952 and 954, Evidence Code.

Attorney, disciplinary proceedings, confidentiality prior to formal proceedings, Section 6086.1, Business and Professions Code.

Attorney, disciplinary proceeding, State Bar access to nonpublic court records, Section 6090.6, Business and Professions Code.

Attorney, law corporation, investigation by State Bar, confidentiality of, Section 6160, Business and Professions Code.

Attorney work product confidentiality in administrative adjudication, Section 11507.6.

Attorney, work product, confidentiality of, Section 6202, Business and Professions Code.

Attorney work product, discovery, Chapter 4 (commencing with Section 2018.010) of Title 4 of Part 4 of the Code of Civil Procedure.

Auditor General, access to records for audit purposes, Sections 10527 and 10527.1.

Auditor General, disclosure of audit records, Section 10525.

Automated forward facing parking control devices, confidentiality of video imaging records from the devices, Section 40240, Vehicle Code.

Automated traffic enforcement system, confidentiality of photographic records made by the system, Section 21455.5, Vehicle Code.

Automobile Insurance Claims Depository, confidentiality of information, Section 1876.1, Insurance Code.

Automobile insurance, investigation of fraudulent claims, confidential information, Section 1872.8, Insurance Code.

Avocado handler transaction records, confidentiality of information, Section 44084, Food and Agricultural Code.
(Amended by Stats. 2009, Ch. 584, Sec. 3. Effective January 1, 2010.)

6276.05. Bank and Corporation Tax, disclosure of information, Article 2 (commencing with Section 10543), Chapter 7, Part 10.2, Division 2, Revenue and Taxation Code.

Bank employees, confidentiality of criminal history information, Sections 777.5 and 4000, Financial Code.

Bank reports, confidentiality of, Section 280, Financial Code.

Basic Property Insurance Inspection and Placement Plan, confidential reports, Section 10097, Insurance Code.

Beef Council of California, confidentiality of fee transactions information, Section 64651.1, Food and Agricultural Code.

Bids, confidentiality of, Section 10304, Public Contract Code.

Birth, death, and marriage licenses, confidential information contained in, Sections 102100, 102110, and 102230, Health and Safety Code.

Birth defects, monitoring, confidentiality of information collected, Section 103850, Health and Safety Code.

Birth, live, confidential portion of certificate, Sections 102430, 102475, 103525, and 103500, Health and Safety Code.

Blood tests, confidentiality of hepatitis and AIDS carriers, Section 1603.1, Health and Safety Code.

Blood-alcohol percentage test results, vehicular offenses, confidentiality of, Section 1804, Vehicle Code.

Business and professions licenses exemption for social security number, Section 30, Business and Professions Code.
(Amended by Stats. 2009, Ch. 584, Sec. 4. Effective January 1, 2010.)

6276.06. Cable television subscriber information, confidentiality of, Section 637.5, Penal Code.

Calfresh, disclosure of information, Section 18000, Welfare and Institutions Code.

California AIDS Program, personal data, confidentiality, Section 120820, Health and Safety Code.

California Apple Commission, confidentiality of lists of persons, Section 75599, Food and Agricultural Code.

California Apple Commission, confidentiality of proprietary information from producers or handlers, Section 75633, Food and Agricultural Code.

California Asparagus Commission, confidentiality of lists of producers, Section 78262, Food and Agricultural Code.

California Asparagus Commission, confidentiality of proprietary information from producers, Section 78288, Food and Agricultural Code.

California Avocado Commission, confidentiality of information from handlers, Section 67704, Food and Agricultural Code.

California Avocado Commission, confidentiality of proprietary information from handlers, Section 67104, Food and Agricultural Code.

California Cherry Commission, confidentiality of proprietary information from producers, processors, shippers, or grower-handlers, Section 76144, Food and Agricultural Code.

California Children's Services Program, confidentiality of factor replacement therapy contracts, Section 123853, Health and Safety Code.

California Cut Flower Commission, confidentiality of lists of producers, Section 77963, Food and Agricultural Code.

California Cut Flower Commission, confidentiality of proprietary information from producers, Section 77988, Food and Agricultural Code.

California Date Commission, confidentiality of proprietary information from producers and grower-handlers, Section 77843, Food and Agricultural Code.

California Egg Commission, confidentiality of proprietary information from handlers or distributors, Section 75134, Food and Agricultural Code.

California Forest Products Commission, confidentiality of lists of persons, Section 77580, Food and Agricultural Code.

California Forest Products Commission, confidentiality of proprietary information from producers, Section 77624, Food and Agricultural Code.

California Iceberg Lettuce Commission, confidentiality of information from handlers, Section 66624, Food and Agricultural Code.

California Kiwifruit Commission, confidentiality of proprietary information from producers or handlers, Section 68104, Food and Agricultural Code.

California Navel Orange Commission, confidentiality of proprietary information from producers or handlers and lists of producers and handlers, Section 73257, Food and Agricultural Code.

California Pepper Commission, confidentiality of lists of producers and handlers, Section 77288, Food and Agricultural Code.

California Pepper Commission, confidentiality of proprietary information from producers or handlers, Section 77334, Food and Agricultural Code.

California Pistachio Commission, confidentiality of proprietary information from producers or processors, Section 69045, Food and Agricultural Code.

California Salmon Commission, confidentiality of fee transactions records, Section 76031.5, Food and Agricultural Code.

California Salmon Commission, confidentiality of request for list of commercial salmon vessel operators, Section 76050, Food and Agricultural Code.

California Seafood Council, confidentiality of fee transaction records, Section 78553, Food and Agricultural Code.

California Seafood Council, confidentiality of information on volume of fish landed, Section 78575, Food and Agricultural Code.

California Sheep Commission, confidentiality of proprietary information from producers or handlers and lists of producers, Section 78343, Food and Agricultural Code.

California State University contract law, bids, questionnaires and financial statements, Section 10763, Public Contract Code.

California State University Investigation of Reported Improper Governmental Activities Act, confidentiality of investigative audits completed pursuant to the act, Section 89574, Education Code.

California Table Grape Commission, confidentiality of information from shippers, Section 65603, Food and Agricultural Code.

California Tomato Commission, confidentiality of lists of producers, handlers, and others, Section 78579, Food and Agricultural Code.

California Tomato Commission, confidentiality of proprietary information, Section 78704, Food and Agricultural Code.

California Tourism Marketing Act, confidentiality of information pertaining to businesses paying the assessment under the act, Section 13995.54.

California Victim Compensation and Government Claims Board, disclosure not required of records relating to assistance requests under Article 3 (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2, Section 6254.17.

California Walnut Commission, confidentiality of lists of producers, Section 77101, Food and Agricultural Code.

California Walnut Commission, confidentiality of proprietary information from producers or handlers, Section 77154, Food and Agricultural Code.

California Wheat Commission, confidentiality of proprietary information from handlers and lists of producers, Section 72104, Food and Agricultural Code.

California Wheat Commission, confidentiality of requests for assessment refund, Section 72109, Food and Agricultural Code.

California Wine Commission, confidentiality of proprietary information from producers or vintners, Section 74555, Food and

Agricultural Code.

California Wine Grape Commission, confidentiality of proprietary information from producers and vintners, Section 74955, Food and Agricultural Code.
(Amended by Stats. 2013, Ch. 227, Sec. 6. Effective January 1, 2014.)

§27.5. Cancer registries, confidentiality of information, Section 103885, Health and Safety Code.

Candidate for local nonpartisan elective office, confidentiality of ballot statement, Section 13311, Elections Code.

Child abuse information, exchange by multidisciplinary personnel teams, Section 830, Welfare and Institutions Code.

Child abuse report and those making report, confidentiality of, Sections 11167 and 11167.5, Penal Code.

Child care liability insurance, confidentiality of information, Section 1864, Insurance Code.

Child concealer, confidentiality of address, Section 278.7, Penal Code.

Child custody investigation report, confidentiality of, Section 3111, Family Code.

Child day care facility, nondisclosure of complaint, Section 1596.853, Health and Safety Code.

Child health and disability prevention, confidentiality of health screening and evaluation results, Section 124110, Health and Safety Code.

Child sexual abuse reports, confidentiality of reports filed in a contested proceeding involving child custody or visitation rights, Section 3118, Family Code.

Child support, confidentiality of income tax return, Section 3552, Family Code.

Child support, promise to pay, confidentiality of, Section 7614, Family Code.

Childhood lead poisoning prevention, confidentiality of blood lead findings, Section 124130, Health and Safety Code.

Children and families commission, local, confidentiality of individually identifiable information, Section 130140.1, Health and Safety Code.

Cigarette tax, confidential information, Section 30455, Revenue and Taxation Code.

Civil actions, delayed disclosure for 30 days after complaint filed, Section 481.050, Code of Civil Procedure.

Closed sessions, document assessing vulnerability of state or local agency to disruption by terrorist or other criminal acts, subdivision (a), Section 6254.

Closed sessions, meetings of local governments, pending litigation, Section 54956.9.

Colorado River Board, confidential information and records, Section 12519, Water Code.

Commercial fishing licenses, confidentiality of records, Section 7923, Fish and Game Code.

Commercial fishing reports, Section 8022, Fish and Game Code.

Community care facilities, confidentiality of client information, Section 1557.5, Health and Safety Code.

Community college employee, candidate examination records, confidentiality of, Section 88093, Education Code.

Community college employee, notice and reasons for nonreemployment, confidentiality, Section 87740, Education Code.
(Amended by Stats. 2009, Ch. 884, Sec. 6. Effective January 1, 2010.)

827.5.5. Conservatee, confidentiality of the conservatee's report, Section 1826, Probate Code.
Conservatee, estate plan of, confidentiality of, Section 2586, Probate Code.
Conservatee with disability, confidentiality of report, Section 1827.5, Probate Code.
Conservator, confidentiality of conservator's birthdate and driver's license number, Section 1834, Probate Code.
Conservator, supplemental information, confidentiality of, Section 1821, Probate Code.
Conservatorship, court review of, confidentiality of report, Section 1851, Probate Code.
Consumer fraud investigations, access to complaints and investigations, Section 26509.
Consumption or utilization of mineral materials, disclosure of, Section 2207.1, Public Resources Code.
Contractor, evaluations and contractor responses, confidentiality of, Section 10370, Public Contract Code.
Contractor, license applicants, evidence of financial solvency, confidentiality of, Section 7067.5, Business and Professions Code.
Controlled Substance Law violations, confidential information, Section 818.7.
Controlled substance offenders, confidentiality of registration information, Section 11594, Health and Safety Code.
Cooperative Marketing Association, confidential information disclosed to conciliator, Section 54453, Food and Agricultural Code.
Coroner, inquests, subpoena duces tecum, Section 27491.8.
County aid and relief to indigents, confidentiality of investigation, supervision, relief, and rehabilitation records, Section 17006, Welfare and Institutions Code.
County alcohol programs, confidential information and records, Section 11812, Health and Safety Code.
County Employees' Retirement, confidential statements and records, Section 31532.
County mental health system, confidentiality of client information, Section 5610, Welfare and Institutions Code.
County social services, investigation of applicant, confidentiality, Section 10461, Welfare and Institutions Code.
County social services rendered by volunteers, confidentiality of records of recipients, Section 10810, Welfare and Institutions Code.
County special commissions, disclosure of health care peer review and quality assessment records not required, Section 14087.58, Welfare and Institutions Code.
County special commissions, disclosure of records relating to the commission's rates of payment for publicly assisted medical care not required, Section 14087.58, Welfare and Institutions Code.
Court files, access to, restricted for 60 days, Section 1161.2, Code of Civil Procedure.
Court reporters, confidentiality of records and reporters, Section 68525.
Court-appointed special advocates, confidentiality of information acquired or reviewed, Section 105, Welfare and Institutions Code.
Crime employers, previous business identities, confidentiality of, Section 7383, Labor Code.
Credit unions, confidentiality of investigation and examination reports, Section 14257, Financial Code.
Credit unions, confidentiality of employee criminal history information, Section 14409.2, Financial Code.
Criminal defendant, indigent, confidentiality of request for funds for investigators and experts, Section 987.9, Penal Code.
Criminal offender record information, access to, Sections 11076 and 13202, Penal Code.
Crop reports, confidential, subdivision (e), Section 6254.
Customer list of employment agency, trade secret, Section 16607, Business and Professions Code.
Customer list of telephone answering service, trade secret, Section 16606, Business and Professions Code.
[Amended by Stats. 2009, Ch. 594, Sec. 7, Effective January 1, 2010.]

827.5.10. Dairy Council of California, confidentiality of ballots, Section 64155, Food and Agricultural Code.
Death, report that physician's or podiatrist's negligence or incompetence may be cause, confidentiality of, Section 802.5, Business and Professions Code.
Dental hygienist drug and alcohol diversion program, confidentiality of records pertaining to treatment, Section 1966.5, Business and Professions Code.
Dentist advertising and referral contract exemption, Section 650.3, Business and Professions Code.
Dentist, alcohol or dangerous drug rehabilitation and diversion, confidentiality of records, Section 1698, Business and Professions Code.
Department of Consumer Affairs licensee exemption for alcohol or dangerous drug treatment and rehabilitation records, Section 156.1, Business and Professions Code.
Department of Motor Vehicles, confidentiality of information provided by an insurer, Section 4750.4, Vehicle Code.
Department of Motor Vehicles, confidentiality of the home address of specified persons in the records of the Department of Motor Vehicles, Section 1808.6, Vehicle Code.
Developmentally disabled conservatee confidentiality of reports and records, Sections 416.8 and 416.10, Health and Safety Code.
Developmentally disabled person, access to information provided by family member, Section 4727, Welfare and Institutions Code.
Developmentally disabled person and person with mental illness, access to and release of information about, by protection and advocacy agency, Section 4903, Welfare and Institutions Code.

Developmentally disabled person, confidentiality of patient records, state agencies, Section 4553, Welfare and Institutions Code.
Developmentally disabled person, confidentiality of records and information, Sections 4514 and 4515, Welfare and Institutions Code.
Diesel Fuel Tax information, disclosure prohibited, Section 60609, Revenue and Taxation Code.
Disability compensation, confidential medical records, Section 2714, Unemployment Insurance Code.
Disability insurers, access to registered information, Section 789.7, Insurance Code.
Discrimination complaint to Division of Labor Standards Enforcement, confidentiality of witnesses, Section 98.7, Labor Code.
Dispute resolution participants confidentiality, Section 471.5, Business and Professions Code.
Division of Workers' Compensation, confidentiality of data obtained by the administrative director and derivative works created by the division, Sections 3201.5, 3201.7, and 3201.9, Labor Code.
Division of Workers' Compensation, individually identifiable information and residence addresses obtained or maintained by the division on workers' compensation claims, confidentiality of, Section 138.7, Labor Code.
Division of Workers' Compensation, individually identifiable information of health care organization patients, confidentiality of, Section 4609.5, Labor Code.
Division of Workers' Compensation, individual workers' compensation claim files and auditor's working papers, confidentiality of, Section 129, Labor Code.
Division of Workers' Compensation, peer review proceedings and employee medical records, confidentiality of, Section 4600.6, Labor Code.
Domestic violence counselor and victim, confidentiality of communication, Sections 1037.2 and 1037.5, Evidence Code.
Driver arrested for traffic violation, notice of reexamination for evidence of incapacity, confidentiality of, Section 42313, Vehicle Code.
Driving school and driving instructor licensees records, confidentiality of, Section 11108, Vehicle Code.
[Amended by Stats. 2005, Ch. 594, Sec. 8. Effective January 1, 2010.]

827.5.15. Educational psychologist-patient, privileged communication, Section 1010.5, Evidence Code.
Electronic and appliance repair dealer, service contractor, financial data in applications, subdivision (x), Section 6254.
Electronic Recording Delivery Act of 2004, exemption from disclosure for computer security reports, Section 27394.
Emergency Care Data Record, exemption from disclosure for identifying information, Section 128736, Health and Safety Code.
Emergency Medical Services Fund, patient named, Section 1797.98c, Health and Safety Code.
Emergency medical technicians, confidentiality of disciplinary investigation information, Section 1798.200, Health and Safety Code.
Emergency Medical Technician-Paramedic (EMT-P), exemption from disclosure for records relating to personnel actions against, or resignation of, an EMT-P for disciplinary cause or reason, Section 1798.112, Health and Safety Code.
Eminent domain proceedings, use of state tax returns, Section 1263.520, Code of Civil Procedure.
Employment agency, confidentiality of customer list, Section 16607, Business and Professions Code.
Employment application, nondisclosure of arrest record or certain convictions, Sections 432.7 and 432.8, Labor Code.
Employment Development Department, furnishing materials, Section 307, Unemployment Insurance Code.
Enteral nutrition products, confidentiality of contracts by the State Department of Health Care Services with manufacturers of enteral nutrition products, Section 14105.9, Welfare and Institutions Code.
Equal wage rate violation, confidentiality of complaint, Section 1197.5, Labor Code.
Equalization, State Board of, prohibition against divulging information, Section 15619.
Escrow Agents' Fidelity Corporation, confidentiality of examination and investigation reports, Section 17336, Financial Code.
Escrow agents' confidentiality of reports on violations, Section 17414, Financial Code.
Escrow agents' confidentiality of state summary criminal history information, Section 17414.1, Financial Code.
Estate tax, confidential records and information, Section 14251, Revenue and Taxation Code.
Excessive rates or complaints, reports, Section 1857.9, Insurance Code.
Executive Department, closed sessions and the record of topics discussed, Sections 11126 and 11126.1.
Executive Department, investigations and hearings, confidential nature of information acquired, Section 11183.
[Amended by Stats. 2009, Ch. 594, Sec. 9. Effective January 1, 2010.]

827.5.16. Family Court, records, Section 1818, Family Code.
Farm product processor license, confidentiality of financial statements, Section 55523.6, Food and Agricultural Code.
Farm product processor licenses, confidentiality of grape purchases, Section 55601.5, Food and Agricultural Code.
Fee payer information, prohibition against disclosure by Board of Equalization and others, Section 55381, Revenue and Taxation Code.
Financial institutions, issuance of securities, reports and records of state agencies, subdivision (d), Section 6254.
Financial statements of insurers, confidentiality of information received, Section 925.3, Insurance Code.

Financial statements and questionnaires, of prospective bidders for the state, confidentiality of, Section 10165, Public Contract Code.
Financial statements and questionnaires, of prospective bidders for California State University contracts, confidentiality of, Section 10763, Public Contract Code.
Firearms, centralized list of exempted federal firearms licensees, disclosure of information compiled from, Sections 26850 to 26920, inclusive, Penal Code.
Firearms, centralized list of dealers and licensees, disclosure of information compiled from, Sections 26700 to 26915, inclusive, Penal Code.
Firearm licensa applications, subdivision (u), Section 6254.
Firearm sale or transfer, confidentiality of records, Chapter 5 (commencing with Section 28050) of Division 6 of Title 4 of Part 6, Penal Code.
Fishing and hunting licenses, confidentiality of names and addresses contained in records submitted to the Department of Fish and Game to obtain recreational fishing and hunting licenses, Section 1050.6, Fish and Game Code.
Foreign marketing of agricultural products, confidentiality of financial information, Section 58577, Food and Agricultural Code.
Forest fires, anonymity of informants, Section 4417, Public Resources Code.
Foster homes, identifying information, Section 1536, Health and Safety Code.
Franchise Tax Board, access to Franchise Tax Board information by the State Department of Social Services, Section 11025, Welfare and Institutions Code.
Franchise Tax Board, auditing, confidentiality of, Section 90005.
Franchises, applications, and reports filed with Commissioner of Corporations, disclosure and withholding from public inspection, Section 31504, Corporations Code.
Fur dealer licenses, confidentiality of records, Section 4041, Fish and Game Code.
(Amended (as amended by Stats. 2010, Ch. 178) by Stats. 2011, Ch. 227, Sec. 8. Effective January 1, 2012. Operative January 1, 2012, pursuant to Stats. 2010, Ch. 178, Sec. 107.)

8276.13. Gambling Control Act, exemption from disclosure for records of the California Gambling Control Commission and the Department of Justice, Sections 19819 and 19821, Business and Professions Code.
Genetically Handicapped Person's Program, confidentiality of factor replacement therapy contracts, Section 125191, Health and Safety Code.
Governor, correspondence of and to Governor and Governor's office, subdivision (l), Section 6254.
Governor, transfer of public records in control of, restrictions on public access, Section 6268.
Grand jury, confidentiality of request for special counsel, Section 936.7, Penal Code.
Grand jury, confidentiality of transcription of indictment or accusation, Section 938.1, Penal Code.
Group insurance, public employees, Section 53202.25.
Guardian, confidentiality of report used to check ability, Section 2342, Probate Code.
Guardianship, confidentiality of report regarding the suitability of the proposed guardian, Section 1543, Probate Code.
Guardianship, disclosure of report and recommendation concerning proposed guardianship of person or estate, Section 1513, Probate Code.
(Amended by Stats. 2009, Ch. 594, Sec. 11. Effective January 1, 2010.)

8273.26. Hazardous substance tax information, prohibition against disclosure, Section 43651, Revenue and Taxation Code.
Hazardous waste control, business plans, public inspection, Section 25506, Health and Safety Code.
Hazardous waste control, notice of unlawful hazardous waste disposal, Section 25180.5, Health and Safety Code.
Hazardous waste control, trade secrets, disclosure of information, Sections 25511 and 25536, Health and Safety Code.
Hazardous waste control, trade secrets, procedures for release of information, Section 25358.2, Health and Safety Code.
Hazardous waste generator report, protection of trade secrets, Sections 25244.21 and 25244.23, Health and Safety Code.
Hazardous waste litaro-holder disclosure statement, confidentiality of, Section 25186.5, Health and Safety Code.
Hazardous waste recycling, information clearing house, confidentiality of trade secrets, Section 25170, Health and Safety Code.
Hazardous waste recycling, list of specified hazardous wastes, trade secrets, Section 25175, Health and Safety Code.
Hazardous waste recycling, trade secrets, confidential nature, Sections 25173 and 25180.5, Health and Safety Code.
Healing arts licensees, central files, confidentiality, Section 800, Business and Professions Code.
Health authorities, special county, confidentiality of records, Sections 14087.35, 14087.36, and 14087.38, Welfare and Institutions Code.
Health care provider disciplinary proceeding, confidentiality of documents, Section 805.1, Business and Professions Code.
Health care service plans, review of quality of care, privileged communications, Sections 1370 and 1380, Health and Safety Code.
Health commissions, special county, confidentiality of peer review proceedings, rates of payment, and trade secrets, Section 14087.31, Welfare and Institutions Code.
Health facilities, patient's rights of confidentiality, subdivision (c) of Section 119745 and Sections 128735, 128736, 128737, 129735,

and 128765, Health and Safety Code.
Health personnel, data collection by the Office of Statewide Health Planning and Development, confidentiality of information on individual licentiates, Section 127780, Health and Safety Code.
Health plan governed by a county board of supervisors, exemption from disclosure for records relating to provider rates or payments for a three-year period after execution of the provider contract, Sections 6254.22 and 54956.87.
Hereditary Disorders Act, legislative finding and declaration, confidential information, Sections 124975 and 124980, Health and Safety Code.
Hereditary Disorders Act, rules, regulations, and standards, breach of confidentiality, Section 124980, Health and Safety Code.
HIV, disclosures to blood banks by department or county health officers, Section 1603.1, Health and Safety Code.
Home address of public employees and officers in Department of Motor Vehicles, records, confidentiality of, Sections 1808.2 and 1808.4, Vehicle Code.
Horse racing, horses, blood or urine test sample, confidentiality, Section 19577, Business and Professions Code.
Hospital district and municipal hospital records relating to contracts with insurers and service plans, subdivision (i), Section 6254.
Hospital final accreditation report, subdivision (k), Section 6254.
Housing authorities, confidentiality of rosters of tenants, Section 34283, Health and Safety Code.
Housing authorities, confidentiality of applications by prospective or current tenants, Section 34332, Health and Safety Code.
(Amended by Stats. 2009, Ch. 594, Sec. 12.5. Effective January 1, 2010.)

8276.15. Improper governmental activities reporting, confidentiality of identity of person providing information, Section 8547.5.
Improper governmental activities reporting, disclosure of information, Section 8547.6.
Industrial loan companies, confidentiality of financial information, Section 31405, Financial Code.
Industrial loan companies, confidentiality of investigation and examination reports, Section 18394, Financial Code.
Influenza vaccine, trade secret information and information relating to recipient of vaccine, Section 120155, Health and Safety Code.
In forma pauperis litigant, rules governing confidentiality of financial information, Section 68511.3.
Infrastructure information, exemption from disclosure for information voluntarily submitted to the Office of Emergency Services, subdivision (ab), Section 6254.
In-Home Supportive Services Program, exemption from disclosure for information regarding persons paid by the state to provide in-home supportive services, Section 6253.2.
Initiative, referendum, recall, and other petitions, confidentiality of names of signers, Section 6253.5.
Insurance claims analysis, confidentiality of information, Section 1875.16, Insurance Code.
Insurance Commissioner, confidential information, Sections 735.5, 1067.11, 1077.3, and 12919, Insurance Code.
Insurance Commissioner, informal conciliator of complaints, confidential communications, Section 1858.02, Insurance Code.
Insurance Commissioner, information from examination or investigation, confidentiality of, Sections 1215.7, 1433, and 1759.3, Insurance Code.
Insurance Commissioner, writings filed with nondisclosure, Section 855, Insurance Code.
Insurance fraud reporting, information acquired not part of public record, Section 1873.1, Insurance Code.
Insurance licensee, confidential information, Section 1666.5, Insurance Code.
Insurer application information, confidentiality of, Section 925.3, Insurance Code.
Insurer financial analysis ratios and examination synopses, confidentiality of, Section 933, Insurance Code.
Department of Resources Recycling and Recovery information, prohibition against disclosure, Section 45982, Revenue and Taxation Code.
International wills, confidentiality of registration information filed with the Secretary of State, Section 6389, Probate Code.
Intervention in regulatory and ratemaking proceedings, audit of customer seeking and award, Section 1804, Public Utilities Code.
Investigation and security records, exemption from disclosure for records of the Attorney General, the Department of Justice, the Office of Emergency Services, and state and local police agencies, subdivision (f), Section 6254.
Investigative consumer reporting agency, limitations on furnishing an investigative consumer report, Section 1786.12, Civil Code.
(Amended by Stats. 2013, Ch. 352, Sec. 108. Effective September 26, 2013. Operative July 1, 2013, by Sec. 543 of Ch. 352.)

8276.16. Joint Legislative Ethics Committee, confidentiality of reports and records, Section 8953.
Judicial candidates, confidentiality of communications concerning, Section 12011.5.
Judicial proceedings, confidentiality of employer records of employee absences, Section 230.2, Labor Code.
Jurors' lists, lists of registered voters and licensed drivers as source for, Section 197, Code of Civil Procedure.
Juvenile court proceedings to adjudge a person a dependant child of court, sealing records of, Section 389, Welfare and Institutions Code.
Juvenile criminal records, dissemination to schools, Section 828.1, Welfare and Institutions Code.
Juvenile delinquents, notification of chief of police or sheriff of escape of minor from secure detention facility, Section 1155, Welfare

and Institutions Code.

Labor disputes, investigation and mediation records, confidentiality of, Section 65, Labor Code.

Lanterman-Petris-Short Act, mental health services recipients, confidentiality of information and records, mental health advocate, Sections 5540, 5541, 5542, and 5550, Welfare and Institutions Code.

Law enforcement vehicles, registration disclosure, Section 5003, Vehicle Code.

Legislative Counsel records, subdivision (m), Section 8254.

Library circulation records and other materials, subdivision (i), Section 8254 and Section 6267.

Life and disability insurers, actuarial information, confidentiality of, Section 10489.15, Insurance Code.

Litigation, confidentiality of settlement information, Section 99513.

Local agency legislative body, closed sessions, disclosure of materials, Section 54958.9.

Local government employees, confidentiality of records and claims relating to group insurance, Section 53202.25.

Local summary criminal history information, confidentiality of, Sections 13300 and 13305, Penal Code.

Local agency legislative body, closed session, nondisclosure of minute book, Section 54957.2.

Local agency legislative body, meeting, disclosure of agenda, Section 54957.5.

Long-term health facilities, confidentiality of complaints against, Section 1419, Health and Safety Code.

Long-term health facilities, confidentiality of records retained by State Department of Public Health, Section 1430, Health and Safety Code.

Los Angeles County Tourism Marketing Commission, confidentiality of information obtained from businesses to determine their assessment, Section 13095.18B.

(Amended by Stats. 2009, Ch. 594, Sec. 14. Effective January 1, 2010.)

6276.30. Managed care health plans, confidentiality of proprietary information, Section 14091.3, Welfare and Institutions Code.

Managed Risk Medical Insurance Board, negotiations with entities contracting or seeking to contract with the board, subdivisions (v) and (y) of Section 8254.

Mandated blood testing and confidentiality to protect public health, prohibition against compelling identification of test subjects, Section 120275, Health and Safety Code.

Mandated blood testing and confidentiality to protect public health, unauthorized disclosures of identification of test subjects, Sections 1603.1, 1603.3, and 121022, Health and Safety Code.

Mandated blood testing and confidentiality to protect public health, disclosure to patient's spouse, sexual partner, needle sharer, or county health officer, Section 121015, Health and Safety Code.

Manufactured home, mobilehome, floating home, confidentiality of home address of registered owner, Section 18081, Health and Safety Code.

Marital confidential communications, Sections 980, 981, 982, 983, 984, 985, 986, and 987, Evidence Code.

Market reports, confidential, subdivision (e), Section 8254.

Marketing of commodities, confidentiality of financial information, Section 58781, Food and Agricultural Code.

Marketing orders, confidentiality of processors' or distributors' information, Section 59202, Food and Agricultural Code.

Marriage, confidential, certificate, Section 511, Family Code.

Medi-Cal Benefits Program, confidentiality of information, Section 14100.2, Welfare and Institutions Code.

Medi-Cal Benefits Program, Request of Department for Records of Information, Section 14124.89, Welfare and Institutions Code.

Medi-Cal Fraud Bureau, confidentiality of complaints, Section 12528.

Medi-Cal managed care program, exemption from disclosure for financial and utilization data submitted by Medi-Cal managed care health plans to establish rates, Section 14301.1, Welfare and Institutions Code.

Medi-Cal program, exemption from disclosure for best price contracts between the State Department of Health Care Services and drug manufacturers, Section 14105.33, Welfare and Institutions Code.

Medical information, disclosure by provider unless prohibited by patient in writing, Section 56.10, Civil Code.

Medical information, types of information not subject to patient prohibition of disclosure, Section 56.30, Civil Code.

Medical and other hospital committees and peer review bodies, confidentiality of records, Section 1157, Evidence Code.

Medical or dental licenses, action for revocation or suspension due to illness, report, confidentiality of, Section 828, Business and Professions Code.

Medical or dental licenses, disciplinary action, denial or termination of staff privileges, report, confidentiality of, Section 805, 805.1, and 805.5, Business and Professions Code.

Meetings of state agencies, disclosure of agenda, Section 11125.1.

Mentally abnormal sex offender committed to state hospital, confidentiality of records, Section 4135, Welfare and Institutions Code.

Mentally disordered and developmentally disabled offenders, access to criminal histories of, Section 1620, Penal Code.

Mentally disordered persons, court-ordered evaluation, confidentiality of reports, Section 5202, Welfare and Institutions Code.

Mentally disordered or mentally ill person, confidentiality of written consent to detainment, Section 5328.4, Welfare and Institutions

Code.

Mentally disordered or mentally ill person, voluntarily or involuntarily detained and receiving services, confidentiality of records and information, Sections 5328, 5328.15, 5328.2, 5328.4, 5328.8, and 5330.9, Welfare and Institutions Code.

Mentally disordered or mentally ill person, weapons restrictions, confidentiality of information about, Section 8103, Welfare and Institutions Code.

Milk marketing, confidentiality of records, Section 61443, Food and Agricultural Code.

Milk product certification, confidentiality of, Section 62121, Food and Agricultural Code.

Milk, market milk, confidential records and reports, Section 62243, Food and Agricultural Code.

Milk product registration, confidentiality of information, Section 30946, Food and Agricultural Code.

Milk equalization pool plan, confidentiality of producers' voting, Section 62716, Food and Agricultural Code.

Mining report, confidentiality of report containing information relating to mineral production, reserves, or rate of depletion of mining operation, Section 2207, Public Resources Code.

Minor, criminal proceeding testimony closed to public, Section 859.1, Penal Code.

Minors, material depicting sexual conduct, records of suppliers to be kept and made available to law enforcement, Section 1309.5, Labor Code.

Misdemeanor and felony reports by police chiefs and sheriffs to Department of Justice, confidentiality of, Sections 11107 and 11107.5, Penal Code.

Monetary instrument transaction records, confidentiality of, Section 14167, Penal Code.

Missing persons' information, disclosure of, Sections 14201 and 14203, Penal Code.

Morbidity and mortality studies, confidentiality of records, Section 100330, Health and Safety Code.

Motor vehicle accident reports, disclosure, Sections 16005, 20012, and 20014, Vehicle Code.

Motor vehicles, department of, public records, exceptions, Sections 1808 to 1808.7, inclusive, Vehicle Code.

Motor vehicle insurance fraud reporting, confidentiality of information acquired, Section 1874.3, Insurance Code.

Motor vehicle liability insurer, data reported to Department of Insurance, confidentiality of, Section 11628, Insurance Code.

Multijurisdictional drug law enforcement agency, closed sessions to discuss criminal investigation, Section 54957.8.

(Amended by Stats. 2009, Ch. 594, Sec. 15. Effective January 1, 2010.)

6276.32. Narcotic addict outpatient revocation proceeding, confidentiality of reports, Section 3152.5, Welfare and Institutions Code.

Narcotic and drug abuse patients, confidentiality of records, Section 11845.5, Health and Safety Code.

Native American graves, cemeteries and sacred places, records of, subdivision (r), Section 6254.

Notary public, confidentiality of application for appointment and commission, Section 8201.5.

Nurse, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, Section 2770.12, Business and Professions Code.

Obscene matter, defense of scientific or other purpose, confidentiality of recipients, Section 311.8, Penal Code.

Occupational safety and health investigations, confidentiality of complaints and complainants, Section 6309, Labor Code.

Occupational safety and health investigations, confidentiality of trade secrets, Section 6322, Labor Code.

Official information acquired in confidence by public employee, disclosure of, Section 1040 and 1041, Evidence Code.

Oil and gas, confidentiality of proposals for the drilling of a well, Section 3724.4, Public Resources Code.

Oil and gas, disclosure of onshore and offshore exploratory well records, Section 3234, Public Resources Code.

Oil and gas, disclosure of well records, Section 3752, Public Resources Code.

Oil and gas leases, surveys for permits, confidentiality of information, Section 8029, Public Resources Code.

Oil spill response information, prohibition against disclosure, Section 46751, Revenue and Taxation Code.

Older adults receiving county services, providing information between county agencies, confidentiality of, Section 9401, Welfare and Institutions Code.

Organic food certification organization records, release of, Section 110845, Health and Safety Code.

Osteopathic physician and surgeon, rehabilitation and diversion records, confidentiality of, Section 2369, Business and Professions Code.

(Amended by Stats. 2009, Ch. 594, Sec. 16. Effective January 1, 2010.)

6276.34. Parole revocation proceedings, confidentiality of information in reports, Section 3063.5, Penal Code.

Passenger fishing boat licenses, records, Section 7923, Fish and Game Code.

Paternity, acknowledgment, confidentiality of records, Section 102760, Health and Safety Code.

Patient-physician confidential communication, Sections 992 and 994, Evidence Code.

Patient records, confidentiality of, Section 123135, Health and Safety Code.

Payment instrument licensee records, inspection of, Section 33208, Financial Code.

Payroll records, confidentiality of, Section 1776, Labor Code.

Peace officer personnel records, confidentiality of, Sections 832.7 and 832.8, Penal Code.

Penitential communication between penitent and clergy, Sections 1032 and 1033, Evidence Code.

Personal Care Services Program, exemption from disclosure for information regarding persons paid by the state to provide personal care services, Section 6253.2.

Personal Income Tax, disclosure of information, Article 2 (commencing with Section 19542), Chapter 7, Part 10.2, Division 2, Revenue and Taxation Code.

Personal information, Information Practices Act, prohibitions against disclosure by state agencies, Sections 1798.24 and 1798.75, Civil Code.

Personal information, subpoena of records containing, Section 1985.4, Code of Civil Procedure.

Personal representative, confidentiality of personal representative's birth date and driver's license number, Section 8404, Probate Code.

Personnel Administration, Department of, confidentiality of pay data furnished to, Section 19826.5.

Petition signatures, Section 18650, Elections Code.

Petroleum supply and pricing, confidential information, Section 25364 and 25365, Public Resources Code.

Pharmacist, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, Section 4372, Business and Professions Code.

Physical therapist or assistant, records of dangerous drug or alcohol diversion and rehabilitation, confidentiality of, Section 2667, Business and Professions Code.

Physical or mental condition or conviction of controlled substance offense, records in Department of Motor Vehicles, confidentiality of, Section 1808.5, Vehicle Code.

Physician and surgeon, rehabilitation and diversion records, confidentiality of, Section 2355, Business and Professions Code.

Physician assistant, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, Section 3534.7, Business and Professions Code.

Physician competency examination, confidentiality of reports, Section 2294, Business and Professions Code.

Physicians and surgeons, confidentiality of reports of patients with a lapse of consciousness disorder, Section 103900, Health and Safety Code.

Physician Services Account, confidentiality of patient names in claims, Section 16656, Welfare and Institutions Code.

Pilots, confidentiality of personal information, Section 1157.1, Harbors and Navigation Code.

Pollution Control Financing Authority, financial data submitted to, subdivision (b), Section 6254.

Postmortem or autopsy photos, Section 129, Code of Civil Procedure.
(Amended by Stats. 2009, Ch. 384, Sec. 17. Effective January 1, 2010.)

877.1b Pregnancy tests by local public health agencies, confidentiality of, Section 123380, Health and Safety Code.

Pregnant women, confidentiality of blood tests, Section 125105, Health and Safety Code.

Prehospital emergency medical care, release of information, Sections 1797.188 and 1797.189, Health and Safety Code.

Prenatal syphilis tests, confidentiality of, Section 120705, Health and Safety Code.

Prescription drug discounts, confidentiality of corporate proprietary information, Section 130506, Health and Safety Code.

Prisoners, behavioral research on, confidential personal information, Section 3515, Penal Code.

Prisoners, confidentiality of blood tests, Section 7530, Penal Code.

Prisoners, medical testing, confidentiality of records, Sections 7517 and 7540, Penal Code.

Prisoners, transfer from county facility for mental treatment and evaluation, confidentiality of written reasons, Section 4011.6, Penal Code.

Private industry wage data collected by public entity, confidentiality of, Section 6254.8.

Private railroad car tax, confidentiality of information, Section 11655, Revenue and Taxation Code.

Probate referee, disclosure of materials, Section 8908, Probate Code.

Probation officer reports, inspection of, Section 1203.05, Penal Code.

Produce dealer, confidentiality of financial statements, Section 56254, Food and Agricultural Code.

Products liability insurers, transmission of information, Section 1857.9, Insurance Code.

Professional corporations, financial statements, confidentiality of, Section 13406, Corporations Code.

Property on loan to museum, notice of intent to preserve an interest in, not subject to disclosure, Section 1899.5, Civil Code.

Property taxation, confidentiality of change of ownership, Section 481, Revenue and Taxation Code.

Property taxation, confidentiality of exemption claims, Sections 63.1, 68.5, and 408.2, Revenue and Taxation Code.

Property taxation, confidentiality of property information, Section 15641, Government Code and Section 833, Revenue and Taxation Code.

Proprietary information, availability only to the director and other persons authorized by the operator and the owner, Section 2778,

Public Resources Code.

Psychologist and client, confidential relations and communications, Section 2918, Business and Professions Code.

Psychotherapist-patient confidential communication, Sections 1012 and 1014, Evidence Code.

Public employees' home addresses and telephone numbers, confidentiality of, Section 6254.3.

Public Employees' Medical and Hospital Care Act, confidentiality of data relating to health care services rendered by participating hospitals to members and annuitants, Section 22854.5.

Public Employees' Retirement System, confidentiality of data filed by member or beneficiary with board of administration, Section 20134.

Public investment funds, exemption from disclosure for records regarding alternative investments, Section 6254.26.

Public school employees organization, confidentiality of proof of majority support submitted to Public Employment Relations Board, Sections 3544, 3544.1, and 3544.5.

Public social services, confidentiality of digest of decisions, Section 10964, Welfare and Institutions Code.

Public social services, confidentiality of information regarding child abuse or elder or dependent persons abuse, Section 10850.1, Welfare and Institutions Code.

Public social services, confidentiality of information regarding eligibility, Section 10850.2, Welfare and Institutions Code.

Public social services, confidentiality of records, Section 10850, Welfare and Institutions Code.

Public social services, disclosure of information to law enforcement agencies, Section 10850.3, Welfare and Institutions Code.

Public social services, disclosure of information to law enforcement agencies regarding deceased applicant or recipient, Section 10850.7, Welfare and Institutions Code.

Public utilities, confidentiality of information, Section 583, Public Utilities Code.

Pupil, confidentiality of personal information, Section 45345, Education Code.

Pupil drug and alcohol use questionnaires, confidentiality of, Section 11605, Health and Safety Code.

Pupil, expulsion hearing, disclosure of testimony of witness and closed session of district board, Section 48918, Education Code.

Pupil, personal information disclosed to school counselor, confidentiality of, Section 49602, Education Code.

Pupil record contents, records of administrative hearing to change contents, confidentiality of, Section 49070, Education Code.

Pupil records, access authorized for specified parties, Section 49076, Education Code.

Pupil records, disclosure in hearing to dismiss or suspend school employee, Section 44944.1, Education Code.

Pupil records, release of directory information to private entities, Sections 49073 and 49073.5, Education Code.
(Amended by Stats. 2010, Ch. 384, Sec. 18. Effective January 1, 2011.)

8275.20. Radioactive materials, dissemination of information about transportation of, Section 33002, Vehicle Code.

Railroad infrastructure protection program, disclosure not required for risk assessments filed with the Public Utilities Commission, the Director of Emergency Services, or the Office of Emergency Services, Section 8254.23.

Real estate broker, annual report to Bureau of Real Estate of financial information, confidentiality of, Section 10232.2, Business and Professions Code.

Real property, acquisition by state or local government, information relating to feasibility, subdivision (h), Section 8254.

Real property, change in ownership statement, confidentiality of, Section 27280.

Records of contract purchasers, inspection by public prohibited, Section 85, Military and Veterans Code.

Registered public obligations, inspection of records of security interests in, Section 5060.

Registration of exempt vehicles, nondisclosure of name of person involved in alleged violation, Section 5003, Vehicle Code.

Rehabilitation, Department of, confidential information, Section 10018, Welfare and Institutions Code.

Reinsurance intermediary-broker license information, confidentiality of, Section 1781.3, Insurance Code.

Relocation assistance, confidential records submitted to a public entity by a business or farm operation, Section 7262.

Rent control ordinance, confidentiality of information concerning accommodations sought to be withdrawn from, Section 7060.4.

Report of probation officer, inspection, copies, Section 1203.05, Penal Code.

Repossession agency license application, confidentiality of information, Sections 7503, 7504, and 7505.5, Business and Professions Code.

Reproductive health facilities, disclosure not required for personal information regarding employees, volunteers, board members, owners, partners, officers, and contractors of a reproductive health services facility who have provided requisite notification, Section 6254.18.

Residence address in any record of Department of Housing and Community Development, confidentiality of, Section 6254.1.

Residence address in any record of Department of Motor Vehicles, confidentiality of, Section 6254.1, Government Code, and Section 1808.21, Vehicle Code.

Residence and mailing addresses in records of Department of Motor Vehicles, confidentiality of, Section 1810.7, Vehicle Code.

Residential care facilities, confidentiality of resident information, Section 1569.08, Health and Safety Code.

Residential care facilities for the elderly, confidentiality of client information, Section 1569.315, Health and Safety Code.

Respiratory care practitioner, professional competency examination reports, confidentiality of, Section 3758, Business and Professions Code.

Restraint of trade, civil action by district attorney, confidential memorandum, Section 16750, Business and Professions Code.

Reward by governor for information leading to arrest and conviction, confidentiality of person supplying information, Section 1547, Penal Code.

Safe surrender site, confidentiality of information pertaining to a parent or individual surrendering a child, Section 1255.7, Health and Safety Code.
(Amended by Stats. 2013, Ch. 373, Sec. 199. Effective September 26, 2013. Operative July 1, 2013, by Sec. 543 of Ch. 352.)

8278.66. Sales and use tax, disclosure of information, Section 7056, Revenue and Taxation Code.

Santa Barbara Regional Health Authority, exemption from disclosure for records maintained by the authority regarding negotiated rates for the California Medical Assistance Program, Section 14400.8, Welfare and Institutions Code.

Savings association employees, disclosure of criminal history information, Section 8525, Financial Code.

Savings associations, inspection of records by shareholders, Section 8050, Financial Code.

School district governing board, disciplinary action, disclosure of pupil information, Section 35146, Education Code.

School employee, merit system examination records, confidentiality of, Section 45274, Education Code.

School employee, notice and reasons for hearing on nonreemployment of employee, confidentiality of, Sections 44948.5 and 44940, Education Code.

School meals for needy pupils, confidentiality of records, Section 49558, Education Code.

Sealed records, arrest for misdemeanor, Section 851.7, Penal Code.

Sealed records, misdemeanor convictions, Section 1203.45, Penal Code.

Sealing and destruction of arrest records, determination of innocence, Section 851.8, Penal Code.

Search warrants, special master, Section 1524, Penal Code.

Sex change, confidentiality of birth certificate, Section 103440, Health and Safety Code.

Sex offenders, registration form, Section 290.021, Penal Code.

Sexual assault forms, confidentiality of, Section 13823.5, Penal Code.

Sexual assault counselor and victim, confidential communication, Sections 1035.2, 1035.4, and 1035.8, Evidence Code.

Shorthand reporter's complaint, Section 8010, Business and Professions Code.

Small family day care homes, identifying information, Section 1596.86, Health and Safety Code.

Social security number, applicant for driver's license or identification card, nondisclosure of, Section 1653.5, Vehicle Code. and

Section 6254.29.

Social security number, official record or official filing, nondisclosure of, Section 9526.5, Commercial Code, and Sections 6254.27 and 6254.28.

Social Security Number Truncation Program, Article 3.5 (commencing with Section 27300), Chapter 6, Part 3, Division 2, Title 3.

Social security numbers within records of local agencies, nondisclosure of, Section 6254.29.
(Amended by Stats. 2003, Ch. 164, Sec. 20. Effective January 1, 2004.)

8278.82. State agency activities relating to unrepresented employees, subdivision (p) of Section 6254.

State agency activities relating to provision of health care, subdivision (s) of Section 8254.

State Auditor, access to barred records, Section 6545.2.

State Auditor, confidentiality of records, Sections 8545, 8545.1, and 8545.3.

State civil service employee, confidentiality of appeal to state personnel board, Section 18952.

State civil service employees, confidentiality of reports, Section 16373.

State civil service examination, confidentiality of application and examination materials, Section 18934.

State Compensation Insurance Fund, exemption from disclosure for various records maintained by the State Compensation Insurance Fund, subdivision (ad), Section 8254.

State Contract Act, bids, questionnaires and financial statements, Section 10165, Public Contract Code.

State Contract Act, bids, sealing, opening and reading bids, Section 10304, Public Contract Code.

State Energy Resources Conservation and Development Commission, confidentiality of proprietary information submitted to, Section 25223, Public Resources Code.

State hospital patients, information and records in possession of Superintendent of Public Instruction, confidentiality of, Section 56863, Education Code.

State Long-Term Care Ombudsman, access to government agency records, Section 9723, Welfare and Institutions Code.

State Long-Term Care Ombudsman office, confidentiality of records and files, Section 9725, Welfare and Institutions Code.

State Long-Term Care Ombudsman office, disclosure of information or communications, Section 9715, Welfare and Institutions Code.

State Lottery Evaluation Report, disclosure, Section 8880.46.

State prisoners, exemption from disclosure for surveys by the California Research Bureau of children of female prisoners, Section 7465, Penal Code.

State summary criminal history information, confidentiality of information, Sections 11105, 11105.1, 11105.3, and 11105.4, Penal Code.

State Teachers' Retirement System, confidentiality of information filed with the system by a member, participant, or beneficiary, Sections 22300 and 28215, Education Code.

Sterilization of disabled, confidentiality of evaluation report, Section 1955, Probate Code.

Strawberry marketing information, confidentiality of, Section 63124, Food and Agricultural Code.

Structural pest control licensee records relating to pesticide use, confidentiality of, Section 15205, Food and Agricultural Code,

Student driver, records of physical or mental condition, confidentiality of, Section 12661, Vehicle Code.

Student, community college, information received by school counselor, confidentiality of, Section 72621, Education Code.

Student, community college, records, limitations on release, Section 76243, Education Code.

Student, community college, record contents, records of administrative hearing to change contents, confidentiality of, Section 76232, Education Code.

Student, sexual assault on private higher education institution campus, confidentiality of information, Section 94365, Education Code.

Student, sexual assault on public college or university, confidentiality of information, Section 67385, Education Code.

Sturgeon egg processors, records, Section 10004, Fish and Game Code.
(Amended by Stats. 2003, Ch. 384, Sec. 31. Effective January 1, 2004.)

8278.44. Taxpayer information, confidentiality, local taxes, subdivision (l), Section 6254.

Tax preparer, disclosure of information obtained in business of preparing tax returns, Section 17530.5, Business and Professions Code.

Teacher, credential holder or applicant, information provided to Commission on Teacher Credentialing, confidentiality of, Section 44341, Education Code.

Teacher, certified school personnel examination results, confidentiality of, Section 44280, Education Code.

Telephone answering service customer list, trade secret, Section 16606, Business and Professions Code.

Timber yield tax, disclosure to county assessor, Section 38706, Revenue and Taxation Code.

Timber yield tax, disclosure of information, Section 38705, Revenue and Taxation Code.

Title insurers, confidentiality of notice of noncompliance, Section 12414.14, Insurance Code.

Tobacco products, exemption from disclosure for distribution information provided to the State Department of Public Health, Section 22954, Business and Professions Code.

Tow truck driver, information in records of California Highway Patrol, Department of Motor Vehicles, or other agencies, confidentiality of, Sections 2431 and 2432.3, Vehicle Code.

Toxic substances, Department of, inspection of records of, Section 25152.5, Health and Safety Code.

Trade secrets, Section 1060, Evidence Code.

Trade secrets, confidentiality of, occupational safety and health inspections, Section 6322, Labor Code.

Trade secrets, disclosure of public records, Section 3426.7, Civil Code.

Trade secrets, food, drugs, cosmetics, nondisclosure, Sections 110165 and 110370, Health and Safety Code.

Trade secrets, protection by Director of the Department of Pesticide Regulation, Section 6254.2.

Trade secrets and proprietary information relating to pesticides, confidentiality of, Sections 14022 and 14023, Food and Agricultural Code.

Trade secrets, protection by Director of Industrial Relations, Section 6396, Labor Code.

Trade secrets relating to hazardous substances, disclosure of, Sections 25358.2 and 25358.7, Health and Safety Code.

Traffic violator school licensee records, confidentiality of, Section 11212, Vehicle Code.

Traffic offense, dismissal for participation in driving school or program, record of, confidentiality of, Section 1808.7, Vehicle Code.

Transit districts, questionnaire and financial statement information in bids, Section 99154, Public Utilities Code.

Tribal-state gaming contracts, exemption from disclosure for records of an Indian tribe relating to securitization of annual payments, Section 63048.63.

Trust companies, disclosure of private trust confidential information, Section 1582, Financial Code.

(Amended by Stats. 2009, Ch. 584, Sec. 22. Effective January 1, 2010.)

8270.45. Unclaimed property, Controller records of, disclosure, Section 1582, Code of Civil Procedure.

Unemployment compensation, disclosure of confidential information, Section 2111, Unemployment Insurance Code.

Unemployment compensation, information obtained in administration of code, Section 1094, Unemployment Insurance Code.

Unemployment fund contributions, publication of annual tax paid, Section 989, Unemployment Insurance Code.

University of California, exemption from disclosure for information submitted by bidders for award of best value contracts, Section 10508.6, Public Contract Code.

Unsafe working condition, confidentiality of complainant, Section 6309, Labor Code.

Use fuel tax information, disclosure prohibited, Section 9255, Revenue and Taxation Code.

Utility systems development, confidential information, subdivision (a), Section 6254.

Utility user tax return and payment records, exemption from disclosure, Section 7284.6, Revenue and Taxation Code.

Vehicle registration, confidentiality of information, Section 4750.4, Vehicle Code.

Vehicle accident reports, disclosure of, Sections 16005, 20012, and 20014, Vehicle Code and Section 27177, Streets and Highways Code,

Vehicular offense, record of, confidentiality five years after conviction, Section 1807.5, Vehicle Code.

Veterans Affairs, Department of, confidentiality of records of contract purchasers, Section 85, Military and Veterans Code.

Veterinarian or animal health technician, alcohol or dangerous drugs diversion and rehabilitation records, confidentiality of, Section 4871, Business and Professions Code.

Victims' Legal Resource Center, confidentiality of information and records retained, Section 13897.2, Penal Code.

Voter registration by confidential affidavit, Section 2194, Elections Code.

Voter registration card, confidentiality of information contained in, Section 6254.4.

Voting, secrecy, Section 1050, Evidence Code.

Wards and dependent children, inspection of juvenile court documents, Section 827, Welfare and Institutions Code.

(Amended by Stats. 2009, Ch. 584, Sec. 23. Effective January 1, 2010.)

8270.55. Wards, petition for sealing records, Section 781, Welfare and Institutions Code.

Winegrowers of California Commission, confidentiality of producers' or vintners' proprietary information, Sections 74655 and 74955, Food and Agricultural Code.

Workers' Compensation Appeals Board, injury or illness report, confidentiality of, Section 6412, Labor Code.

Workers' compensation insurance, dividend payment to policyholder, confidentiality of information, Section 11739, Insurance Code.

Workers' compensation insurance fraud reporting, confidentiality of information, Section 1877.4, Insurance Code.

Workers' compensation insurer or rating organization, confidentiality of notice of noncompliance, Section 11754, Insurance Code.

Workers' compensation insurer, rating information, confidentiality of, Section 11752.7, Insurance Code.

Workers' compensation, notice to correct noncompliance, Section 11754, Insurance Code.

Workers' compensation, release of information to other governmental agencies, Section 11752.5, Insurance Code.

Workers' compensation, self-insured employers, confidentiality of financial information, Section 3742, Labor Code.

Workplace inspection photographs, confidentiality of, Section 6314, Labor Code.

Youth Authority, parole revocation proceedings, confidentiality of, Section 1767.6, Welfare and Institutions Code.

Youth Authority, release of information in possession of Youth Authority for offenses under Sections 676, 1764.1, and 1764.2, Welfare and Institutions Code.

(Amended by Stats. 2009, Ch. 584, Sec. 24. Effective January 1, 2010.)

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CODE OF CIVIL PROCEDURE - CCP
PART 4. MISCELLANEOUS PROVISIONS [1859 - 2107] *(Heading of Part 4 amended by Stats. 1986, Ch. 238.)*

TITLE 1. OF THE GENERAL PRINCIPLES OF EVIDENCE [1856 - 1894] *(Title 1 enacted 1872.)*

1858. When any map which has been recorded in the office of the recorder of any county is injured, destroyed, lost, or stolen, any person interested may file in the superior court of the county in which the map was originally filed or recorded a verified petition in writing alleging that the map has been injured, destroyed, lost, or stolen without fault of the person making the application, and that the petitioner has a true and correct copy of the original map which he or she offers for record in the place of the original map. The petition shall be accompanied by a copy of the true copy offered for record.

Upon the filing of the petition the clerk shall set it for hearing by the court, and give notice of the hearing by causing notice of the time and place of the hearing to be posted at the courthouse in the county where the court is held at least 10 days prior to the hearing. A copy of the petition and a copy of the true copy offered for record shall be served upon the recorder of the county in which the proceedings are brought at least 10 days prior to the hearing. The court may order any further notice to be given as it deems proper. At the time set for the hearing the court shall take evidence for and against the petition, and if it appears to the court from the evidence presented that the copy of the map submitted is a true copy of the original map, it shall decree that the copy is a true copy of the original map, and order the copy placed of record in the office of the recorder in the place of the original map.

A certified copy of the decree shall accompany the true copy of the map for record. When presented to the county recorder for record, he or she shall place of record the copy of the map in the place of the original map.

When placed of record the copy shall have the same effect as the original map, and conveyances of property referring to the original map shall have the same effect as though the original map had not been injured, destroyed, lost, or stolen, and conveyances thereafter made referring to the copy of the original map shall be deemed to refer also to the original map.

(Added by renumbering Section 1855D by Stats. 1907, Ch. 56, Sec. 23.)

1856. (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.

(b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.

(c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance.

(d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to the terms included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.

(e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue.

(f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.

(g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

(h) As used in this section, "agreement" includes trust instruments, deeds, wills, and contracts between parties.

(Amended by Stats. 2013, Ch. 81, Sec. 1. Effective January 1, 2014.)

1857. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

(Enacted 1872.)

1858. In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(Enacted 1872.)

1859. In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

(Enacted 1872.)

1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.

(Enacted 1872.)

1861. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

(Enacted 1872.)

1862. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

(Enacted 1872.)

1864. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

(Enacted 1872.)

1865. A written notice, as well as every other writing, is to be construed according to the ordinary acceptation of its terms. Thus a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment and the same refused, and that the holder looks for payment to the person to whom the notice is given.

(Enacted 1872.)

1866. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former is to be adopted.

(Enacted 1872.)

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San Francisco Administrative Code

CHAPTER 12M: PROTECTION OF PRIVATE INFORMATION *

Sec. 12M.1. Definitions.
Sec. 12M.2. Nondisclosure of Private Information.
Sec. 12M.3. Enforcement.
Sec. 12M.4. Contract Requirements.
Sec. 12M.5. Exceptions.
Sec. 12M.6. Preemption.
Sec. 12M.7. Severability
Sec. 12M.8. Amendment by the Board of Supervisors.

SEC. 12M.1 DEFINITIONS.

For the purposes of this Chapter, the following definitions shall apply to the terms used herein.

(a) "City" shall mean the City and County of San Francisco.

(b) "Contract" shall mean an agreement for goods or services, including without limitation agreements for public works or improvements, or grant agreements (1) to be purchased or provided, at the expense of the City and County or to be paid out of moneys deposited in the treasury or out of trust moneys under the control of or collected by the City and County or (2) which grants the Contractor the right to receive revenues from access other than the City based on its services under the agreement.

(c) "Contractor" shall mean any person or persons, associations, cooperatives, firm, partnership, corporation, trustee, trustee in bankruptcy, receiver, or combination thereof, who submits a Bid or Proposal or enters into a Contract with the City and County.

(d) "Contracting Department" shall mean the department that recommends or requests that a Contract be executed by the Office of Contract Administration, the Department of Public Works, or other department or public official authorized to execute the contract on the department's behalf.

(e) "Private Information" shall mean any information that (1) could be used to identify an individual, including without limitation name, address, social security number, medical information, financial information, date and location of birth, and names of relatives; or (2) the law forbids any person from disclosing.

(f) "Subcontractor" shall mean any person or persons, associates, cooperative, firm, partnership, corporation, trustee, trustee in bankruptcy, receiver, or combination thereof, including without limitation any subcontractor, subconsultant or supplier at any tier, that has an arrangement or agreement, directly or indirectly, with a Contractor to perform any of Contractor's obligations under the Contract.

(Added by Proposition O, 11/7/2006)

SEC. 12M.2. NONDISCLOSURE OF PRIVATE INFORMATION.

(a) The City shall not disclose Private Information to any person or entity unless specifically authorized to do so by the subject individual or by Contract or when required by Federal or State law or judicial order. The City shall not enter into any Contract for the primary purpose of disclosing Private Information and shall not receive any compensation for the disclosure of Private Information.

(b) No Contractor or Subcontractor who receives Private Information from the City in the performance of a Contract may disclose that information to a Subcontractor or any other person or entity, unless the Contract authorizes the disclosure, the Contractor has first received written approval from the Contracting Department to disclose the information, or the disclosure is expressly required by judicial order. The disclosure and the use of the information shall be in accordance with any conditions or restrictions stated in the Contract or the Contracting Department's approval and shall not be used except as necessary in the performance of the obligations under the Contract. The department head or the department head's designee shall sign any approvals of the Contracting Department.

(Added by Proposition O, 11/7/2006)

SEC. 12M.3. ENFORCEMENT.

Any failure of a Contractor to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Contract. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate the Contract, bring a false claim action against the Contractor pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar the Contractor.

(Added by Proposition O, 11/7/2006)

SEC. 12M.4. CONTRACT REQUIREMENTS.

All Contracts and amendments to Contracts entered into after ninety days after the effective date of this Chapter shall incorporate by reference the provisions of Sections 12M.2 and 12M.3 of this Chapter.

(Added by Proposition O, 11/7/2006)

SEC. 12M.5. EXCEPTIONS.

This Chapter shall not apply in the following circumstances:

(a) When a Contract involves the expenditure of funds received by the City and County to the extent the application of the Chapter would violate or be inconsistent with the terms or conditions of the applicable grant agreement, subvention or agreement or the instructions of an authorized representative of any such agency with respect to any such grant agreement, subvention or agreement.

(b) When a Contract is for the purchase, sale, transfer or lease of any interest in real property or a license or permit for the use of real property.

(Added by Proposition O, 11/7/2006)

SEC. 12M.6. PREEMPTION.

Nothing in this Chapter shall be interpreted or applied so as to create any power or duty in conflict with any Federal or State law.

(Added by Proposition O, 11/7/2006)

SEC. 12M.7. SEVERABILITY.

If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provisions to other persons or circumstances, shall not be affected by such holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

(Added by Proposition O, 11/7/2006)

SEC. 12M.8. AMENDMENT BY THE BOARD OF SUPERVISORS.

The Board of Supervisors may amend this Chapter to ensure the protection of Private Information with a two-thirds vote.

(Added by Proposition O, 11/7/2006)

Notes

* *Editor's note:*
Proposition O, approved November 7, 2006, repealed former Ch. 12M. In its entirety, and enacted provisions designated as new Ch. 12M to read as herein set out. Former Ch. 12M was entitled, "Nondisclosure of Private Information."

Provisions of the Sunshine Ordinance - Section 67

Select Language

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Sec. 67.29-3.

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Sec. 67.31. Responsibility for Administration.

Sec. 67.32. Provision of Meetings to other Agencies; Rumsfeld Required.

Sec. 67.33. Department Head Declaration.

Sec. 67.34. Willful Failure Shall Be Official Misconduct.

Sec. 67.35. Enforcement Provisions.

Sec. 67.36. Sunshine Ordinance Supersedes Other Local Laws.

Sec. 67.37. Severability.

Sec. 67.1. Prohibiting The Use Of Call Phones, Pagers And Similar Sound-Producing Electronic Devices At And During Public Meetings.

Sec. 67.2 Finding And Purpose.

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

(a) Government's duty is to serve the public, seeking its guidance in full view of the public.

(b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these officials the right to decide what the people should know about the operation of local government.

(c) Although California law is long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who find certain comfortable overbearing public business away from the window of those who elect and employ them. More oppressive to government than unfriendly or even hostile officials are officials who, in the name of public policy, form inner circles to govern behind closed doors.

(d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and while very few exceptions, that right supersedes any other policy interest government officials may seek to promote public access to information. Only in very rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, but those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.

(e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.

(f) The people of San Francisco grant their consent to ensure that the people of the City remain in control of the government they have created.

(g) Private entities and individuals and employees and officials of the City and County do not possess basic rights or privacy that must be respected. However, when a person or entity is to form a policy body or receive funding, that person, and the public, has the right to see open and public process. (Added by Ord. 229-93, App. 8/18/93; amended by Proposition O, 11/6/95)

Sec. 67.2. Citation.

This Chapter may be cited as the San Francisco Sunshine Ordinance. (Added by Ord. 229-93, App. 8/18/93; amended by Proposition O, 11/6/95)

Sec. 67.3. Definitions.

Whenever in this Article the following words or phrases are used, they shall have the following meanings:

(a) "City" shall mean the City and County of San Francisco.

(b) "Meeting" shall mean any of the following:

(1) A congregation of a majority of the members of a policy body at the same time and place;

(2) A series of gatherings, each of which involves less than a majority of a policy body, in leer, discuss or deliberate upon any item that is within the subject matter jurisdiction of the City, if the cumulative result

is that a majority of members has become involved in such gatherings; or

(3) Any other use of personal intermediaries or communications media that could permit a majority of the members of a policy body to become aware of an item of business and of the views or positions of other members with respect thereto, and to negotiate consensus thereupon.

(c) "Meeting" shall not include any of the following:

(1) Individual contacts or conversations between a member of a policy body and another person that do not convey to the member the views or positions of other members upon the subject matter of the contact or conversation and in which discussion does not solicit or encourage the development of the views of the other members;

(2) The attendance of a majority of the members of a policy body at a regional, statewide or national conference, or at a meeting organized to address a topic of local community concern and open to the public, provided that a majority of the members refrains from using the occasion to individually discuss the topic of the gathering or any other business within the subject matter jurisdiction of the City;

(3) The attendance of a majority of the members of a policy body at a purely social, recreational or ceremonial occasion other than one sponsored or organized by or for the policy body itself, provided that a majority of the members refrains from using the occasion to discuss the business within the subject matter jurisdiction of the body. A meet gathering of a policy body before, during or after a business meeting of the body is part of that meeting and shall be conducted only under circumstances that permit public access to it and that observe the discussion restrictions. Such meetings shall not be conducted to circumvent or alter recommendations where public access is granted only to certain persons who represent or come after certain interests;

(4) Proceedings of the Department of Social Services Child Welfare Placement and Review Committee as similar committees which exist in regular confidential information and make decisions regarding placement of Social Services clients.

(5) "Passive meeting body" shall mean:

(A) Advisory committees created by the initiative of a member of a policy body, the mayor, or a department head;

(B) Any group that meets, in closer with or under the charge or any Department Head or Commission, or policy bower.

(C) Social, recreational or ceremonial committees sponsored or organized by or for a policy body or which a majority of the body has been invited.

(D) "Passive meeting body" shall not include a committee that consists solely of employees of the City and County of San Francisco created by the initiative of a member of a policy body, the Mayor, or a department head.

(E) Notwithstanding the provisions of paragraph (5) above, "Passive meeting body" shall include a committee that consists solely of employees of the City and County of San Francisco when such committee is reviewing, developing, modifying, or enacting city policies or procedures relating to the public health, safety, or welfare or relating to services for the homeless.

(d) "Policy body" shall mean:

(1) The Board of Supervisors;

(2) Any other board or commission enumerated in the charter;

(3) Any board, committee, commission, or other body created by ordinance or resolution of the Board of Supervisors;

(4) Any advisory board, commission, committee or body, except the initiative of a policy body;

(5) Any standing committee of a policy body irrespective of its composition.

(6) "Policy body" shall not include committees which operate solely of employees of the City and County of San Francisco, unless such committee was established by charter or by ordinance or resolution of the Board of Supervisors.

(7) Any advisory board, committee, committee, or ensuet covered by a federal, state, or local grant when meetings are regulated by any official, employee or agents. (Added by Ord. 229-93, App. 8/18/93; amended by Ord. 119-96, App. 4/19/96; Proposition O, 11/6/95)

Sec. 67.4. Passive Meetings.

(a) All gatherings of passive meeting bodies shall be accessible to individuals upon inquiry and to the extent possible consistent with the facilities in which they occur.

(b) Such gatherings need not be formally noticed, except as the City's website whenever possible, although the time, place and nature of the gathering shall be disclosed upon inquiry to a member of the public, and any agenda actually prepared for the gathering shall be available in such leer form as a public record.

(c) Such gatherings need not be conducted in any particular space for the accommodation of members of the public, although members of the public shall be permitted to observe on a space available basis consistent with legal and practical restrictions on occupancy.

(d) Such gatherings of a business nature need not provide opportunities for comment by members of the public, although the person presiding may, in his or her discretion, entertain such questions or comments as he or she may be relevant to the business of the gathering.

(e) Each gathering of a social or ceremonial nature need not provide refreshments to patrons.

(f) Gatherings subject to this subsection include the following advisory committees or other multimember bodies created by writing or by the initiative of, or otherwise primarily formed or existing to serve as a non-governmental advisor to, a member of a policy body, the Mayor, the City Administrator, a department head, or an elective officer, and social, recreational or ceremonial occasions sponsored or organized by or for a policy body to which a majority of the body has been invited. This subsection shall not apply to committees which consists solely of employees of the City and County of San Francisco.

(g) Gatherings defined in subdivision (g) may hold closed sessions under circumstances allowed by this Article.

(h) To the extent not inconsistent with, and not preempted by, federal or state law, a policy body shall include in any notice and agenda for a meeting or other gathering occurring on or after January 1, 1994, a brief general description of any item to be discussed or acted upon by the body at the gathering, including items to be discussed in closed session. A brief general description of an item generally need not exceed twenty words. The agenda shall specify the location of the gathering and whether any writings that constitute agenda items will be available for public inspection at a meeting or after a meeting. Boilerplate language is not sufficient to meet the requirements of this subdivision. The agenda shall specify the time and location where writings relating to agenda items are available for public inspection. Failure to comply with this subdivision shall not affect the validity of any action taken at a meeting that complies with all other applicable requirements.

(i) Each policy body shall post any agenda required by this section to the Internet and in at least one location freely accessible to the public at least 72 hours before a meeting. Each policy body shall post the minutes of its meetings on the Internet within ten days after approval by the policy body. Each policy body shall post on the Internet the definitions of terms it uses in its agendas or minutes, such as "consent calendar," "routine," "regular order," or "unanimous." Each policy body shall post on the Internet a description of its regular meeting schedule, including the regular dates, times, and locations of meetings. Each policy body shall post on the Internet any proclamation issued by the body at least 72 hours before the meeting at which the proclamation will be voted on by the body. Each policy body shall post on the Internet any contract, or proposed contract, that will be considered at a meeting of the body at least 72 hours before that meeting. All of the above shall be posted in accordance with rules established by the Task Force. (Added by Ord. 229-93, App. 8/18/93; amended by Ord. 119-96, App. 4/19/96; Proposition O, 11/6/95)

Sec. 67.5. Meetings To Be Open And Public; Application Of Brown Act.

All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et. seq.) and of this article. In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expeditious public access shall apply. (Added by Ord. 229-93, App. 8/18/93; amended by Proposition O, 11/7/95)

Sec. 67.6. Conduct Of Business; Time And Place For Meetings.

(a) Each policy body, except for advisory bodies, shall establish by resolution or motion the time and place for holding regular meetings.

(b) Unless otherwise required by state or federal law or necessary to impel required or personal property which cannot be reasonably kept safe without adequate security within the territory of the City and County of San Francisco or to meet with residents residing on property owned by the City, or to meet with residents residing adjacent to property owned by the City but which is not within the City and County of San Francisco, all meetings of a policy body shall be held within the City and County of San Francisco.

(c) If a regular meeting would otherwise fall on a holiday, it shall instead be held on the next business day, unless otherwise rescheduled in advance.

(d) If, because of fire, flood, earthquake or other emergency, it would be unsafe to meet at the regular meeting place, meetings may be held for the duration of the emergency at some other place specified by the policy body. The change of meeting site shall be announced, by the most rapid means of communication available at the time, in a notice to the local media who have requested written notice of special meetings pursuant to Government Code Section 54956. Reasonable attempts shall be made to request others regarding the change in meeting location.

(e) Meetings of passive meeting bodies as specified in Section 67.4(f)(4) of this article must be preceded by notice delivered personally or by mail, e-mail, or facsimile to reasonably requested at least 72 hours before the time of each meeting to each person who has requested, in writing, notice of such meeting. If the advisory body elects to hold regular meetings, it shall provide by bylaws, or whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. In such case, no notice of regular meetings, other than the posting of an agenda pursuant to Section 67.7 of this article is required by the policy body which it applies, is required.

(f) Special meetings of any policy body, including advisory bodies that choose to establish regular meeting times, may be called at any time by the presiding officer thereof or by a majority of the members thereof, by delivering personally or by mail written notice to each member of such policy body and to each local media who have requested written notice of special meetings in writing. Such notice of special meeting shall be delivered as described in (e) at least 72 hours before the time of each meeting as specified in the notice. The notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the presiding officer or secretary of the body a written waiver of notice. Such waiver may be given by telegram. Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. Each special meeting shall be held at the regular meeting place of the policy body except that the policy body may designate an alternate meeting place provided that such alternate

location is specified in the notice of the special meeting. Action provided that the notice of the special meeting will be given at least 72 clear business days before the special meeting, being held within fifteen calendar days after the last regular meeting of the Board of Supervisors, unless a shorter period is necessary in order to respond to an emergency situation.

(c) Unless the Board of Supervisors, by a two-thirds vote of all members present, shall determine otherwise, no special meeting shall be held outside the boundaries of the City and County of San Francisco. Any special meeting held outside the boundaries of the City and County of San Francisco shall be held only for the purpose of conducting business related to the interests of the City and County of San Francisco.

(d) Notice of special meetings shall be given in the manner provided by Section 67.16 of this Article.

(e) Special meetings may be held at any suitable location designated by the Board of Supervisors in the notice of the special meeting, provided that the location is within the boundaries of the City and County of San Francisco, except as provided in subsection (c) above.

(f) Special meetings may be held at any time the Board of Supervisors has set by resolution for the holding of regular meetings.

(g) Special meetings may be held at any time the President of the Board of Supervisors or the Mayor determines that an emergency exists.

(h) Special meetings may be held at any time upon the written request of a majority of the members of the Board of Supervisors.

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(yyyyyyyyyyyyyy) Special meetings may be held at any time upon the written request of a majority of the members of the

from any such closed meeting, during the commission of a compliment, or any of other compliances in the matter. The term "employee" as used in this section shall include any elected official, member of a policy body appointed for such a position, or person employed by the City and County including but not limited to employees of the City who are independent contractors or other persons who perform one or more functions providing legal services to the City for a fee rather than salary.

(d) Memorandum of Understanding (MOU). An Executive Compromise Committee established pursuant to a Memorandum of Understanding with the municipal Executive Associations may meet in closed session when evaluating the performance of an elected officer or employee subject to the Memorandum of Understanding or when establishing performance goals for such an officer or employee short of taking of such steps require disclosure of those individual's performance.

(e) Based on advice of its legal counsel, and on a motion and vote in open session to enact the attorney-client privilege, in confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would likely and unavoidably prejudice the position of the City in the litigation. Litigation shall be considered pending when any of the following circumstances exist:

(1) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the City is a party, has been initiated formally; or,

(2) A point has been reached where, in the opinion of the policy body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the City, or the body by making only a decision whether a closed session is authorized pursuant to this section, based on those facts and circumstances, the body has decided to initiate or defend itself in litigation to initiate litigation.

(3) A closed session may not be held under this section to avoid public disclosure or engagement of an independent contractor retained or law firm, for litigation services or advocacy.

(4) With the City's delegated representative regarding matters within the scope of collective bargaining or meeting and conferring with public employee organizations when a policy body has authority over such matters.

(5) Such closed sessions shall be for the purpose of instructing the City's position and instructing its delegated representatives and may take place only prior to and during active consultations and discussions between the City's delegated representatives and the representatives of employee organizations or the unrepresented employees. A policy body shall not discuss or express its position or other contextual matters in closed sessions with one or more employee organizations or unrepresented employees.

(6) In addition to the authorization as limited by subsection 67.10(d)(5), a policy body subject to Government Code Section 3505 may hold closed sessions with its designated representatives or employees subject to within the scope of representation of its represented employees, as determined pursuant to Section 3504. (Added by Ord. 69-93, App. 3/5/93; amended by Ord. 32-94, App. 1/31/94; Proposition O, 11/8/95)

Sec. 67.11. Statement Of Closed Sessions.

Prior to any closed session, a policy body shall announce the general nature of matters to be considered in the closed session, and shall call it to the attention or notice of all persons in attendance. Such announcement may be made at the regular meeting preceding the closed session, or at any other meeting conducted not less than 24 hours in advance of the closed session. The announcement may be made from the items on the agenda for the closed session, and no additional notice is required. The announcement shall be made with the same disclosure and confidentiality required by Section 67.8 of this ordinance, as set forth in the following:

In the case of an item added to the agenda as a matter of urgent necessity, the statement shall be made prior to the determination of urgency and with the same disclosure and confidentiality as set forth in the last item included in the agenda pursuant to Section 67.8 of this ordinance. Nothing in this section shall require or authorize a disclosure of information prohibited by state or federal law. (Added by Ord. 69-93, App. 3/5/93; amended by Proposition O, 11/8/95)

Sec. 67.12. Closed-Session Discussions And Actions.

(a) After any closed session, a policy body may by an oral or in his public interest, disclose to the public any portion of its discussion that is not confidential under federal or state law, the Charter, or non-waivable privilege. The body shall, by motion and vote in open session, elect either to disclose or to disclose information. Use a majority clause in lieu to the public interest. The disclosure shall be made through the presiding officer of the body or such other person, present to the closed session, whom he or she designates in open session for this purpose.

(b) A policy body shall publicly report any actions taken in closed session and the reasons why such action is deemed necessary in the public interest, as follows:

(1) Real Property Negotiations: Approval given in a policy body's negotiation concerning real estate negotiations pursuant to Government Code Section 54956.8 shall be reported to cause to be announced in open session at the time of the approval, unless the approval is final only when the agreement is executed. In that case, the approval shall be reported when the agreement is executed and delivered to the other negotiating parties. If final approval rests with another party to the negotiations, the body shall disclose the fact of the approval, the substance of the agreements and the body's vote or vote thereon upon inquiry by any person, as soon as the other party or parties have informed the body of the approval. If the terms of the final approval differ from the substance of the terms previously reported, the differences shall be described to the public in writing when disclosed for completion of the transaction, or then as a multiple-contingency or timely board inspection that anything mentioned for completion, the document referred to in subdivision (b) of this section need not be disclosed until the execution has been satisfied or the agreement has been reached when signing by the properties, or both.

(c) Litigation: Direction or approval given to the body's legal counsel to prosecute, defend or settle claims arising appellate review or relief, or to otherwise enter or to settle, intervene or initiate action by any other adjudicative proceeding in the need of reconciliation pursuant to Government Code Section 54956.9 shall be reported in open session as soon as prior, or at the first meeting after an adversary party has been served in the matter if immediate disclosure of the City's litigation would be contrary to the public interest. This report shall identify the adverse party or parties, any co-parties with the City, any existing claim or order in the dispute and any relief or any lawsuit that may be filed against the City or any of its officers, employees, agents, or volunteers.

(c) Settlement: A policy body shall neither publicly nor agree in anything in a settlement which would preclude the release of the text of the settlement itself and any related documentation communicated to or executed by the other party or parties. Any written settlement agreement and any documents executed or released to be submitted to the body publicly available at least 24 hours in advance of the body before the meeting of the policy body at which the settlement is to be approved to the extent that the settlement would secure the City or a department thereof in pledging, conciliating, or disbursing or making public, positive or negative comments that, during the time of the meeting at which the settlement is approved, the terms of the settlement are not to be made available to the public. The agreement may not identify the names of the parties, the case number, the court, and the material terms of the settlement. Where the disclosure of documents in a litigation matter that has been settled could be detrimental to the City's interest in pending litigation arising from the same or related matters and involving a party not a party to or otherwise covered the settlement, the documents required to be disclosed by subdivision (b) of this section need not be disclosed until the other case is settled or otherwise finally concluded.

(d) Employee Actions: Action taken to appoint, employ, dismiss, or accept the resignation of a public employee in closed session pursuant to Government Code Section 54957 shall be reported immediately in a manner the same as the employee, the action taken and parties affected and, in the case of dismissal for a violation of law or of the policy of the City, the reasons for dismissal. "Dismissal" within the meaning of this section means final action by any termination of employment at the will of an employer rather than of the employee, however characterized. The required terms of any separation agreement that has been already disclosed to news as provided for in this section shall be deemed fully disclosed upon the execution of the agreement.

(e) Collective Bargaining: Any authority bargained agreement shall be made publicly available at least 24 calendar days before the meeting of the policy body in which the agreement is to be approved.

(f) Reports required to be made to a policy body by its executive or by writing, but shall be supported by a copy of any contract, settlement agreement, or other documents related to the transaction that was finally approved or adopted in the closed session and that are made by the information required to be disclosed immediately shall be provided to any person who has made a written request regarding that item following the posting of the agenda, or who has made a standing request for all such documentation as part of a request for notice of meetings pursuant to Government Code Section 54954.1 or 54954.5.

(g) A written summary of the information required in and immediately supported pursuant to this section, or documents embodying that information, shall be posted by the close of business on the next business day following the meeting. In the place where the meeting agendas of the body are posted. (Added by Ord. 69-93, App. 3/5/93; amended by Proposition O, 11/8/95)

Sec. 67.13. Routine Meetings Of Elective Officers; Rules.

(a) No policy body shall conduct any meeting, conference or other function in any facility that excludes persons on the basis of actual or perceived class identity or characteristics, or which is inaccessible to persons with physical disabilities, or where members of the public may not be present without making a payment or purchase. Whenever the Board of Supervisors, a board or commission pursuant to the charter, or any committee thereof anticipates that the number of persons attending the meeting will exceed the legal capacity of the meeting room, any public address system made available for the meeting room shall be extended by supervisors many speakers to permit the overflow audience to listen to the proceedings in an adjacent room or passageway, unless such supplementary speakers would disrupt the operation of a City office.

(b) Each board and commission enumerated in the charter shall provide sign language interpreters or real-time when at such regular meeting, provided that a request for such services is communicated to the secretary or clerk of the board or commission at least 48 hours before the meeting, except for Monday meetings, for which the deadline shall be 4 p.m. of the last business day of the preceding week.

(c) Each board and commission enumerated in the charter shall ensure that accessible seating for persons with disabilities, including those using wheelchairs, is made available for each regular and special meeting.

(d) Each board and commission enumerated in the charter shall include on the agenda for each regular and special meeting the following statement: "In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals."

(e) The Board of Supervisors shall seek to provide translators at each of all regular meetings and all meetings of the committees for each languages requested, where the translation is necessary to make the

Procedure residents who find it difficult to participate in the proceedings provided that a request for such translation services is communicated to the Clerk of the Board of Supervisors at least 48 hours before the meeting. For meetings on a Monday or a Tuesday, the request must be made by noon of the last business day of the preceding week. The Clerk of the Board of Supervisors shall take all reasonable measures from the media of City employees and/or from the community to serve as translators. If assistance can not available to the Clerk of the Board of Supervisors may not unduly constraint from non-paid agencies, which may be requested. If these options are not provide the necessary translation services, the Clerk may employ professional translators. The unavailability of a translator shall not relieve the ability of the Board of Supervisors or its committees in deliberate to vote upon any matter presented to them. In any calendar year in which the City or the preceding translation services under this subsection exceeds $10,000, the Board of Supervisors shall, as soon as practicable thereafter, review the provisions of this subsection. (Added by Ord. 69-93, App. 3/5/93; amended by Ord. 32-94, App. 1/31/94; Proposition O, 11/8/95)

Sec. 67.14. Time And Audio Recording, Minutes And Staff Responsibility.

(a) Any person attending an open and public meeting of a policy body shall have the right to record the proceedings with an audio or video recorder or a still or motion picture camera, or to broadcast the proceedings. In the event it is reasonably finding of the policy body that the recording or broadcast cannot continue without such noise, disturbance or obstruction of normal functions to the disruption of the proceedings.

(b) Each tape-recorded summaries are recorded in the charter shall on the record each regular and special meeting. Each such audio recording, and any recording of a meeting of any other policy body made at the direction of the policy body shall be retained by the public record delivery to the Public Records Retention Center. Section 54957 as set forth herein shall not be destroyed, impossible of any such recording shall be provided without charge on an appropriate playback device made available by the City. (Added by Ord. 69-93, App. 3/5/93; amended by Proposition O, 11/8/95)

(c) Every City policy body, agency or department shall ascribe or else record every verbal regular meeting, special meeting, or hearing open to the public in a City hall hearing room are to equipped with either video recording, open or to also secure the use of such equipment when such a meeting will be available for televised or video cameras. Each such body and public record subject to the provision pursuant to the California Public Records Act (Government Code Section 6250 et seq.), and shall not be erased or destroyed. The City shall make such audio or video recordings available in digital form as a recorded legislative body or any subcommittee thereof, and shall not be erased or destroyed. The minutes and tape recordings of each regular meeting shall be posted on the website of the City for a period of no less than 30 days after the date of the meeting or hearing. Exception of each such recording shall also be provided without charge on an appropriate playback device made available by the City. This subsection (b) shall not be construed to limit or in any way modify the duties carried by law with respect to the duties of this article, including but not limited to the requirements for meeting of closed sessions as noted in Section 54.9 and for recording meetings of boards and commissions enumerated in the Charter contained in subsection (b) above. (Added by Ord. 84-08, App. 5/16/08)

Sec. 67.15. Public Testimony.

(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within the policy body's subject matter jurisdiction, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by Section 67.7(c) of this article. However, in the case of a meeting of the Board of Supervisors, the opportunity for members of the public to address the Board may be limited to matters that have already been considered by a committee, duly noticed meeting of members of the Board, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the Board.

(b) Every agenda for special meetings at which action is proposed to be taken on an item shall provide an opportunity for each member of the public to directly address the body concerning that item prior to action thereupon.

(c) A policy body may adopt reasonable regulations to ensure that the intent of subdivision (a) and (b) are carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and on each individual speaker. Each policy body shall adopt a policy that each person wishing to speak on an item before the body at a regular or special meeting shall be permitted to be handicap for up to three minutes. Time limits shall be applied uniformly to members of the public wishing to testify.

(d) A policy body shall not adopt or publish public criteria or like policy, procedures, programs or services of the City, or any other aspect of its proposal to notice, or of the acts or omissions of the body, on the basis that the performance of any or most public employees is insufficient, or on any basis other than reasonable time constraints imposed by subdivision (c) of this section.

(e) To facilitate public input, any agenda changes or maintenance shall be announced by the presiding officer of a policy body at the beginning of a meeting, or as soon thereafter as the change or continuance becomes known to each presiding officer. (Added by Ord. 69-93, App. 3/5/93; amended by Proposition O, 11/8/95)

Sec. 67.16. Minutes.

The clerk or secretary of each board and committee enumerated in the charter shall cause the minutes for each regular and special meeting of the board or committee. The minutes shall state the time the meeting was called to order, the roll call of members present, the time of adjournment, and the vote of each member considered at the meeting. The last time and record or recitation began and ended any closed session, the names of the members and the room, and other when applicable, of other persons attending any closed session, a list of those members of the public who spoke on each matter if the speakers identified themselves, whether each speaker supported or opposed the matter, a substantial summary of each person's statement, and to the public comment period for each agenda item, and the time the meeting was adjourned. Any person speaking during a public comment period may request a brief written summary of their statements which shall, if no more than one words, be included in the minutes.

The draft minutes of each meeting shall be available for inspection and copying upon request no later than two working days after the meeting. The officially approved minutes shall be available for inspection and copying upon request no later than two working days after the meeting at which the minutes are adopted. Upon request, minutes required to be produced by this section shall be made available in braille or audiotape upon request. (Added by Ord. 69-93, App. 3/5/93; amended by Proposition O, 11/8/95)

Sec. 67.17. Public Comment By Members Of Policy Bodies.

Every member of a policy body retains the full constitutional rights of a citizen in comment publicly on the volume or propriety of government actions, including those of the policy body of which he or she is a member. Policy bodies shall not censure, reprove or deprive members of their membership or any committee or other entities for exercising those rights. Nothing in this section shall be construed to prohibit reasonable limitations on the duration of public discussion, antisemi-violence or actions with the requirements of state or federal law or of this Charter. The charter of specific factual information made confidential by state or federal law including, but not limited to, attorney-client communications, may be limited to be made by a request for injunctive or declaratory relief, or complaint in the future seeking an amount or of misconduct, or both. (Added by Ord. 69-93, App. 3/5/93; amended by Proposition O, 11/8/95)

Sec. 67.20. Definitions.

Whenever in this article in the following words or phrases are used, they shall mean:

(a) "Department" shall mean a department of the City and County of San Francisco.

(b) "Public Information" shall mean the meaning of "public records" as defined in the California Public Records Act (Government Code Section 6250), whether purchased in documentary or form or in oral communication. "Public information" shall not include "computer software" developed by the City and County of San Francisco as defined in the California Public Records Act (Government Code Section 6254.9).

(c) "Supervisor of Records" shall mean the City Attorney. (Added by Ord. 69-93, App. 3/5/93; amended by Ord. 325, App. 8/31/95; Proposition O, 11/8/95)

Sec. 67.21. Process For Gaining Access To Public Records; Administrative Appeals.

(a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any non-exempt portion of a record, to be inspected and examined by any person and shall furnish one copy thereof of a reasonably copying charge, not to exceed the actual cost or cost per copy.

(b) A custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request, that request may be delivered to the office of custodian by the requesting party or mailed to the custodian by postal delivery, or e-mail, if the custodian believes the person requested to see a public record is entitled to inspect the record, the custodian shall justify withholding any record by demonstrating, in writing or as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

(c) A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information not initially sought, available to, in the custody of the custodian, whether or not the existence of those records may exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement to that statement, generally, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person.

(d) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b), the person making the request may petition the supervisor of records for a determination whether the record requested is public. The supervisor of records shall inform the petitioner, as soon as possible and within ten days, of his determination whether the record requested, or any part of the record requested, is public. When requested by the petition, and where otherwise available, this determination shall be in writing. Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses to fails to comply with any such order within 5 days, the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures he or she deems necessary and appropriate to have compliance with the provisions of this ordinance.

(e) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) where or if a petition is denied or not acted on by the supervisor of public records, the person making the

request) may petition the Supervisor Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 4 days after the date of receipt of the petition, of the Sunshine Task Force's determination whether the record requested is public or is exempt from disclosure pursuant to this Ordinance. If the Sunshine Task Force determines that the record requested is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 4 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to ensure compliance with the provisions of this ordinance. The Board of Supervisors and the City Attorney's office shall provide sufficient staff and resources to allow the Sunshine Task Force to fulfill its duties under this provision. When requested by the petitioner, the Sunshine Task Force may conduct a public hearing concerning the records requested denied. An unlawful segregation of the materials of the public records requested shall stand any hearing and may also be basis for the petition to withhold the records requested.

(f) The administrative remedy provided under this article shall in no way limit the availability of other administrative remedies provided to any person with respect to any officer or employee of any agency, executive office, department or board, nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. The custodian of a public record refusing or fails to comply with the request of any person for inspection or copy of a public record or with the administrative order under this section, the requestor must shall have jurisdiction to order compliance.

(g) In any court proceeding pursuant to this article there shall be a presumption that the record sought is public, and the burden shall be upon the custodian in every case to prove by the examples to which applies.

(g)(h) On or before January 1, 2000, and on a biennial basis thereafter, the Supervisor Task Force, the supervisor of public records shall prepare a study and report of any problem brought before it for review in records where the time of 10 days will not suffice. The report shall at least identify the types of problems the record or records brought, the number of such records, the ruling of the supervisor of public records, whether any ruling was overturned by a court and whether unless given to sanctions. All public records were followed. The report shall also recommend any cost or actions during that period regarding petitions to the Supervisor Sunshine. At the request of the Sunshine Ordinance Task Force, the report shall also include a study of the requirement of public records and of petitions issued.

(i) The San Francisco City Attorney's office shall act to protect and preserve the rights of the people of San Francisco to ensure public conformance and public openness and shall not act as legal counsel for any city employee in any person having custody of any public record or portion of a public record. The City Attorney may publish legal opinions in response to a request from any person or in whether a report or ordinance is public. All communications with the City Attorney's Office with regard to advice, including written opinions, are open and shall not be public records.

(j) Notwithstanding the provisions of this section, the City Attorney may defend the City or a City department in litigation under this ordinance that is actually filed in court in any court regulated by the City Charter or California law.

(k) Actions of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particular not inhibited by this ordinance shall be consistent with the enhanced disclosure requirements provided in this ordinance.

(l) Inspection and copying of documentary public information stored in electronic form shall be made available in the person requesting the information in any form requested which is available to or easily generated by the department, its officers or employees, including disk, tape, printout or modified at a charge no greater than the cost of the media on which it is duplicated. Inspection of documentary public information on a computer monitor need not be allowed when information might be inseparably and improperly intermixed with information not subject to disclosure under this ordinance. Including, the custodian shall require a department to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement as required by law. (Added by Ord. 415-93, Apr. 8)(1/1/) amended by Ord. 123-96, App. 4/19/96; Ord. 208-00, 8/11/00)

Sec. 8.1. Policy Regarding Use and Function Of Computer Systems.

(a) It is the policy of the City and County of San Francisco to utilize computer technology in order to enhance the ease of public access to information, including and information, to the public about the department's operations, plans, policies and positions. The departments and may designate himself or herself for this assignment, but in any event shall arrange that an adequate and accessible job description describing the elements of the person assigned primary responsibility. If a department has multiple bureaus or divisions, the department may designate a person or persons for each bureau or division to perform this information.

(b) The role of the person or persons so designated shall be to provide information on an hourly and reasonable basis or position to those members of the public who are not requesting information from a specific person. This activity shall not be interpreted to prohibit talking informal conversations between employees and members of the public which these contacts are considered, acceptable to the employee and the department, and disruptive of his or her operational duties and confined to occasions information are conducted by law.

(c) No employee shall be disciplined or suffer any adverse personnel action for having provided information to the citizens in violation of this ordinance requirements as the employee or supervisor.

(d) Public employees shall not be disciplined from or disciplined for the expressing of his or personal opinions on any matter of public concern while on duty, so long as the opinions (i) do not represented as that of the department and does not interrupt the department operations, and (ii) does not disrupt co-worker relations, impair discipline, undermine working relationships premised on personal loyalty and confidentiality, interfere with the performance of the employee's duties or obstruct the routine operations of the department or the City. Nothing in this section shall be construed to prohibit any employee from expressing their opinions.

(e) Nothing in this shall not be construed to prohibit any employee from engaged in union membership or union activities, under the Meyers-Milias-Brown Act, or to serve as any employee union representative or to defend an disciplinary action.

(f) Nothing in this section shall be construed to prohibit any employee from engaged in union membership or union activities, under the Meyers-Milias-Brown Act, or to serve as any employee union representative or to defend an disciplinary action.

(g) Nothing in this section shall be construed to prohibit any employee from engaged in union membership or union activities, under the Meyers-Milias-Brown Act, or to serve as any employee union representative or to defend an disciplinary action.

(h) The role of the person or persons so designated shall be to provide information on an hourly and reasonable basis or position to those members of the public who are not requesting information from a specific person. This activity shall not be interpreted to prohibit talking informal conversations between employees and members of the public which these contacts are considered, acceptable to the employee and the department, and disruptive of his or her operational duties and confined to occasions information are conducted by law.

(i) No employee shall be disciplined or suffer any adverse personnel action for having provided information to the citizens in violation of this ordinance requirements as the employee or supervisor.

(j) Public employees shall not be disciplined from or disciplined for the expressing of his or personal opinions on any matter of public concern while on duty, so long as the opinions (i) do not represented as that of the department and does not interrupt the department operations, and (ii) does not disrupt co-worker relations, impair discipline, undermine working relationships premised on personal loyalty and confidentiality, interfere with the performance of the employee's duties or obstruct the routine operations of the department or the City. Nothing in this section shall be construed to prohibit any employee from expressing their opinions. In adopting this subdivision, the Board of Supervisors intends merely to restate and affirm court decisions interpreting the First Amendment rights enjoyed by public employees.

(k) Nothing in this section shall be construed to prohibit any employee from engaged in union membership or union activities, under the Meyers-Milias-Brown Act, or to serve as any employee union representative or to defend an disciplinary action.

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(bb) Nothing in this section shall be construed to prohibit any employee from engaged in union membership or union activities, under the Meyers-Milias-Brown Act, or to serve as any employee union representative or to defend an disciplinary action.

(cc) Nothing in this section shall be construed to prohibit any employee from engaged in union membership or union activities, under the Meyers-Milias-Brown Act, or to serve as any employee union representative or to defend an disciplinary action.

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compliance with this ordinance by the public, provided that policy body meeting and discussion does not include communication. In the case of response for a contact, time or other business agreement in which an agency of the City is offering to provide facilities or services to about competition with other public or private entities that are not required by law to make their competing proprietary public or do not in fact make their proposals public, the policy body may postpone public access to the final draft agreement until it is presented in its for approval.

(b) Eligible Material.

(1) Notwithstanding any exemption elsewhere provided by law, the following are public records subject to disclosure under this Ordinance:

(1) A pre-litigation claim against the City;

(2) A record previously created or received by a department in the ordinary course of business that was not otherwise privileged when it was previously created or received;

(3) Advice to employees who, pursuant to, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance.

(4) Unless otherwise privileged under California law, when litigation is finally adjudicated or otherwise settled, records of all communications between the department and the adverse party shall be subject to disclosure, including the text and terms of any settlement.

(5) Personal information. None of the following shall be exempt from disclosure under Government Code Section 7922, subdivision (b), or any other provision of California law where disclosure is not forbidden:

(i) The job and classification and employment and education histories of all executive branch employees, including at a minimum the following information as to each executive branch employee:

(1) Name, age and salary;

(2) Years of previous and undergraduate study, degree(s) and major or disciplines;

(3) Years of employment in San private and/or public service;

(4) Whether currently employed in the San Francisco area position for whether public agency.

(5) Other non-identifying participation in conferences, internships, application, training or education entered to or attended to a successful employment application form used for the position in question.

(a) The provisions of biography or application sheet of any employee, provided that (i) a homeowner, business employer, notice and security number, age, and marital status of the employee shall be redacted.

(g) The job description of every employment classification.

(h) The exact gross salary and City paid benefits available to every employee.

(i) Any examination of or administering between the City or department and a recognized employee organization.

(j) The amount, basis, and recipient of any performance bonus between San Francisco, including, at least, any merit, other bonus, awarded to any employee, which shall be announced during the open session of a policy body at which it is moved to approved.

(k) The record of any conferred attendance of a public employee becoming personal dishonesty, misappropriation of public funds, malicious or hostile, unlawful discrimination against member on the basis of sex, disability, or religion, or violence, and of any disciplinary imposed for such misconduct.

(l) Law Enforcement Information.

The District Attorney, Sheriff, Police, and Sheriff are exempted in the requests with the press and other members of the public in allowing access to local records pertaining to investigations, arrests, and other law enforcement activity. However, no provision of this ordinance is intended to abrogate or interfere with the responsibilities and statutory power and duties of the District Attorney and Sheriff or interpreted under Government Code section 6254, or other applicable law, to withhold information in order to fulfill duties. Records pertaining to investigations, arrest or other law enforcement activity shall be disclosed to the public once the District Attorney or court determines that a prosecution will not be sought against the subject involved, or once the statute of limitations for filing charges has expired, whichever occurs first. Notwithstanding the necessity to protect the confidentiality of witnesses, individual victims of crime and to the following investigation may be withheld, and in particular, the public interest in and statutory duty and epistemically weighed the public interest in disclosure.

(1) The name, address and telephone identifying any witness who has indicated he or she will be harassed by withholding a number or alphabetical letter for each individual interviewed;

(2) Personnel or otherwise private information related to or contained in the investigation if disclosure would constitute an unwarranted invasion of privacy;

(3) The identity of a confidential source;

(4) Secret investigative techniques or procedures;

(5) Information whose disclosure would endanger law enforcement personnel; or

(6) Information where disclosure would endanger the successful completion of an investigation where the prospect of enforcement proceedings is concrete and definite.

Title established shall not exempt from disclosure any portion of any record of a concluded inspection or enforcement action by an officer or department responsible for regulatory protection of the public health, safety, or welfare.

(m) Coroner, Medical Records

(1) Ordinance, department, City, agencies to require for personnel and other records of communications between the department and persons or firms seeking contracts to open inspection issued only after a contract has been awarded. Nothing in this provision requires the disclosure of opinions possessed or expressed by an organization's or not work or other proprietary financial data submitted for qualification for the contract or work bond until after all bids for games or organizations to establish the contract or benefit. All Makers and statements shall be disclosed if information provided which is exempt by this subdivision will be made available to the public upon request. Immediately after any notice or acceptance of bid or request for proposal ("RFP") has been completed, evaluation forms and worksheets used in the selection process for vendors in the RFP and work or contractor selection process shall be available for public inspection. The names of scores, grades or worksheets, along with their individual ratings, summaries, and notes shown or comments to related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(n) Notwithstanding the above, nothing in this subdivision may require disclosure, the Director of Public Health may withhold disclosure personnel and final notes of payment for managed health care contracts if the Director determines that public disclosure would adversely affect the ability of the City to engage in effective negotiations for managed health care contracts. The authority to withhold this information applies to any contract or portion pursuant to the City through the Department of Public Health, other plan for health care services or medical compensation for providing such services, including mental health and substance abuse services, or covered benefits that through a pre-arranged rate of payments. This provision also applies to rates for managed health care contracts for the University of California, San Francisco, if the contract has been heretofore after made before disclosure prohibited jointly by the City and University. This provision shall not authorize the Director to withhold this information from disclosure for more than two years.

(o) Qualifying exams of applications list.

(1) personal, professional, or other personnel matters not subject to a complaint letters or written work a process law enforced at a stage where there is only one qualified or an appointee eligible;

(2) exams or panels having total weighted averages or exams to the City and County of San Francisco and planned actions (applications) or work or having a term of two years or more; or

(3) any therefore agreements.

(4) documents exempted and subject to the position of the parties, including their contents, shall be made available for public inspection and copying upon request. In the event that no records are produced or exchanged during negotiations by or above mentioned categories, or the parties exchanged do not produce a meaningful representation of the respective positions, the City attorney or any representative from the city negotiations shall, upon a written request by a member of the public, prepare written summaries of the respective positions within five working days following the final day of negotiations of any given week. The summaries will be available for public inspection and copying. Upon completion of negotiations, the material contained, including the dollar amounts of each contract, shall be made available for inspection and copying. At the end of each fiscal year, each City department shall provide to the Board of Supervisors a list of all open contracts entered into during the past fiscal year. This list shall be made available for inspection and copying or provided for download in this Article.

(5) Budgets and Other Financial Information. Budgets, whether summary, proposed or adopted, for the City or any City department, program, projects or other enterprise, and all bills, orders, invoices, vouchers or other records of payment obligations as well as records of actual disbursements during the previous year, the years and the purposes for which payment is made, except that payments for social services or welfare which may be confidential by law, shall not be exempt from disclosure under this ordinance.

(6) Without the City nor any office, employee, or agent thereof may assert this California Public Records Act Section 6254 or any similar provision in the basis for withholding any document or information requested under this ordinance.

(7) Neither the City nor any office, employee, or agent thereof may assert an exemption for withholding for any document or information based on a "deliberative process" exemption, either as provided by California Public Records Act Section 6254 or any other provision of law that does not explicitly disclose.

(f) Neither the City, nor any office, employee, or agent thereof, may assert exemption for withholding (a) any document or information based on a finding or showing that the public interest in withholding the information is clearly outweighed by the public interest in disclosure, or (b) any draft of a document or information unless the draft is itself subject to exemption for withholding at the specific type of information in question or on an express and specific exemption also provided by Sunshine Public Records Act that by its terms forbids any City employee from disclosing. (Added by Ord. 585-93, Apr. 8/1/93; amended by Ord. 191-02, App. 6/28/02; Ord. 401-08, App. 12/19/08; Proposition B, 11/4/08)

Sec. 67.25. Immediacy Of Response.

(a) Notwithstanding the 10-day period for response to a request pertained to Government Code Section 6253 and in the Article 1 written request for information described in any excerpt of non-exempt public information shall be given to the later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and if the oral request, submitted, or sent shall in which the request is transmitted. Maximum deadlines provided in this article are suggestions for reasonableness or demanding requests, but shall not be used to delay fulfilling simple, routine or otherwise readily answerable requests.

(b) If the only reason part of the information requested, its location in a repose storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6253 (c), a response shall be mailed or emailed by the close of business on the business day following its request.

(c) The person making the information need not state his or her reason for making the request or the use to which the information will be put, and requestors shall not be routinely asked to make such a disclosure. When asserted in law, required statutory information must not be withheld because it is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requestor of the correct statutory citation and the agency or department's statutory basis in the requestor's purpose for making it, in order to suggest alternative sources for the information that may involve less restrictions or otherwise prepare a response to the request.

(d) Notwithstanding any provisions of California Public Records Act to the contrary, in response to a request for information describing any excerpt of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records or item or reasonably possible as an instrument or "calling" back such that responsive items are produced as soon as possible by the end of the same business day (not days nor weekends) and enforced. The requirements to conduct a public tips of building all public records that are responsive in a manner in open and all responsive documentary business shall not be delayed. Failure to comply with this provision is a violation of this article. (Added by Ord. 585-93, App. 8/1/93; amended by Proposition O, 11/4/96)

Sec. 67.26. Withholding Kept To A Minimum.

No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or a clearly other statute. Information that is exempt from disclosure shall be marked, deleted or otherwise segregated in the non-exempt portions of a requested record may be released, and issued by footnote or other clear reference in the agency's determination in withholding such information by any officer or employee of any office or department of the City. No such record shall be withheld in its entirety on the basis of any claim that some portions of it are exempt from disclosure. The work of responding to a public records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged in the response to review the personnel costs of responding to a records request. (Added by Ord. 585-93, App. 8/1/93; amended by Proposition O, 11/4/96)

Sec. 67.27. Justification Of Withholding.

Any withholding of information shall be justified, in writing, as follows:

(a) A withholding under specific permissive exemption in the California Public Records Act, or otherwise, which permissive exemption is not withdrawn or lessened by this ordinance, shall cite that authority.

(b) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act or elsewhere.

(c) A withholding on the basis that disclosure would pose only an unclear or indirect threat to the security of City property or the safety of City employees, supporting fact particulars.

(d) When a record being requested and is withheld in its entirety, it is enough that disclosure under the California Public Records Act and this article, the custodian shall inform the requestor of the nature and extent of the non-exempt information and suggest alternative sources for the information requested. Revisions: (Added by Ord. 585-93, App. 8/1/93; amended by Proposition O, 11/4/96)

Sec. 67.28. Fees For Duplication.

(a) No fee shall be charged for making public records available for review.

(b) Fees for necessary routinely produced in multiple copies for distribution, e.g. meeting agendas and related materials, unless special factors established pursuant to subdivision (d) of this section, a fee not to exceed one cent per page may be charged, plus any postage costs.

(c) For documents assembled or edited in the review of the requestor, unless a special fee has been established pursuant to subdivision (d) of this section, a fee not to exceed 10 cents per page may be charged, plus any postage.

(d) A department may establish and charge a higher fee than the one provided for in subdivision (b) and (c) for its most commonly-to-be-available-to (1) its reports and posts on limited not exempt establishing that its cost per page to produce exceeds 10 cents or one cent, as the case may be. The cost per page in a series shall include the following costs: one sheet of paper; ink; duplication costs of the copying machine; the cost of labor and other specifically identifiable supplies or maintenance factors, excluding clerical support costs, and specifically identifiable overhead costs, such as rent and maintenance contracts. If any, of the copying machine or machines referred to.

(e) Video copies of video material meetings shall be provided to the public upon the request for $10.00 or less per meeting. (Added by Ord. 585-93, App. 8/1/93; amended by Proposition O, 11/4/96)

Sec. 67.29. Index To Records.

The City and County that prepare a public records index that identifies the types of information and documents maintained by City and County departments, agencies, boards, commissions, and elected officers. The Index shall be for the use of City Officials, staff of the general public, and shall be organized in a general understanding of the types of information maintained, by which officials and departments, for which purposes and for what periods of retention, and under what manner of organization for accessing. e.g. by reference to a name, a date, a proceeding or project, or some other referencing system. The Index shall not refer to each individual in the City who made a meeting agenda a public person, attendance or other event, but shall clearly indicate where and how records of that type are kept. Any such master index shall be reviewed by appropriate staff for accuracy and grounded for formal adoption by the administrative official or policy body responsible for the indexed records. The City administrator shall be responsible for the preparation of this annual index of the Sunshine Ordinance. The Administrator shall submit a report to the Board of Supervisors on or before last week in January each year by which the Index is completed. Each department, agency, commission and public official shall cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity and those documents received by the entity, copies of which are maintained by other City Departments. Each department, agency, commission and public official shall identify the manner, format, and accompanying public participation in developing a meaningful master index. The Index shall clearly and expressly identify timeline, with as much specificity as practicable, the individual types of records that are prepared or maintained by each department, agency, commission or public official's position or procedures relating to the accessing of City records. The Index shall be sufficiently detailed to provide the public with a meaningful description of the department, agency, commission or public official's position or procedures relating to the accessing of the information provided to the City Administrator shall be compiled by the City Administrator as a periodic basis so as to maintain the integrity and accuracy of the Index. The Index shall be continuously maintained on the City's World Wide Website and made available to the public from the office of the City and County of San Francisco. (Added by Ord. 585-93, App. 8/1/93; amended by Ord. 191-98, App. 7/10/98; Proposition O, 11/4/96)

Sec. 67.29-1. Records Routine Transition Of Officials.

All documents prepared, received, or maintained by the Office of the Mayor, by any elected City and county official, and by the head of any City or County Department are the property of the City and County of San Francisco. The originals of these documents shall be maintained consistent with the records retention policies of the City and County of San Francisco. (Added by Proposition O, 11/4/96)

Sec. 67.29-2. Document Access On World Wide Web Website.

Each department of the City and County of San Francisco shall maintain on a World Wide Web site, or on a non-profit, readily accessible location on the Internet, information that it is required to make publicly available. Each department is encouraged to make publicly available through its World Wide Web Site, as much information and to keep documents as possible consistent by available, at a minimum, within six months after maximum at this provision, each department that post on its World Wide Web Site all meeting notice agendas, final minutes and the minutes of all previous meetings of by online bodies for at least two years. Notice and agendas shall be posted on Internet Web Sites less than the department minutes distributions information as the public, allowing reasonable time for posting. Minutes of meetings shall be posted as soon as possible, but in any event within 48 hours after they have been approved. Each department shall make reasonable efforts to ensure that its World Wide Web site is regularly reviewed for technical and spelling of an errors in readily basis. The City and County shall also make available via its World Wide Web Site, on a comparable, readily accessible location on the Internet, a current copy of the City Charter and all City Codes. (Added by Proposition O, 11/4/96)

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Any future agreements between the city and/or subsidiary agents providers will be public records and shall include on a basis for the terms basis of the contract any action by, or permitted by, the open portfolio to remove or disclose or otherwise interfere with an advertisement without first notifying the advertiser and the city and obtaining the advertiser's consent. In the event and circumstances was declared or mandated, the open provider will provide written notice to the city and the advertiser and shall allow the advertiser the option of applying the refund or rendered material. Any requests by any city official or by any space provider to access or clear any advertising sent be in writing and shall be a public record. (Added by Proposition O, 11/4/96)

Sec. 67.29-3. Guideline On Benefit Of The City.

(a) Any legislation who contracts for economic consultants with the City and County of San Francisco to represent the City and County in matters before any local, regional, state, or federal administrative or

legislative body shall file a public records report of their activities on a quarterly basis with the San Francisco Ethics Commission. This report shall be maintained by the Ethics Commission and not be exempt from disclosure. The quarterly report shall identify: (1) the name of each person to be employed by the subject, the individual's or entity's name and corporate structure, if any. The date the consultant was employed; (2) identify the local, state, regional or national legislative or administrative action the lobbyist was employed or opposed in making the expenditure. The Ethics or like a quarterly report shall be a violation of the Ordinance.

(b) The person shall be deemed a lobbyist under section (a), unless that person receives or becomes entitled to receive at least $500 for such compensation in any month for influencing legislative or administrative action on behalf of the City and County of San Francisco or has been employed by a person who receives such level, state, regional or national lobbyists for the purpose of influencing legislative or administrative action on any one occasion exceeds. The business or organization shall be deemed an activity under section (a) unless compensation to employees or members for their lobbying activities on behalf of the City and County of San Francisco, or such compensation exceeds one hundred dollars ($100.00) in any month for lobbying by such employees or members at local, state, regional or national activities for the purpose of influencing legislative or administrative action within any two consecutive months. "Local compensation" shall be calculated by combining all remunerations received from the City and County of San Francisco during the month for lobbying activities on matters at the local, state, regional or national level. "Total number of months" shall be calculated by combining all months made during the two-month period on behalf of the City and County of San Francisco for lobbying activities on matters at the local, state, regional or national level.

(c) Funds of the City and County of San Francisco, including organizational dues, shall not be used to organize any lobbying efforts to request public comment, or meetings, except where such effort is for the purpose of influencing the identity and proper application of private citizens. (Added by Proposition O, 11/4/96)

Sec. 67.29-5. Calendar Of Public Officials.

The Mayor, The City Attorney, each department head shall keep or cause to be kept a daily calendar sheets to be maintained the time and general work meeting or event attended by that official, with the exception of purely personal or social events at which no city business is discussed and that do not take place at City Offices or on the offices or maintenance of public city buildings. Each calendar shall be open to public inspection during office hours and shall be retained by the City for a period of not less than two years. Nothing in this section shall be construed to require disclosure of the calendars of the Mayor's staff or other City employees, except to the extent otherwise required. Such calendars shall be public records and shall be available to any requestor three business days and open to the calendar entry date. (Added by Proposition O, 11/4/96)

Sec. 67.29-6. Review Of Guideline Policy.

No official or employee of the City and County of San Francisco, elected or appointed, or director or employee thereof, shall accept any gift or service which costs that individual dollars in aggregate, for the purpose of accepting, or in exchange for any City function when the amount and source of all such things is disclosed as a public record and made available on the website for the department in which the funds are directed. When all funds are granted or managed by an entity, and not an individual, the entity must register in writing as a lobbyist by the ordinance. The Ethics Commission shall include the name of all individuals or organizations contributing such money and a statement as to any financial interest (as constituted by law) binding the City. (Added by Proposition O, 11/4/96)

Sec. 67.29-7. Communication And Reporting Requirements.

(a) The Mayor and all Department Heads shall maintain and preserve a professional and impartial manner at departments and correspondences, including but not limited to letters, e-mails, drafts, memorandum, business, reports and projects and all of their actions at all such records in accordance with this ordinance.

(b) The Department of Elections shall keep and preserve all committee activity reports, including campaign statements and other election materials and shall keep and preserve records documenting who had custody of ballots from the time ballots are received and certified by City Supervisors of Elections.

(c) Any approval, agreement or permit issued by any City department shall be unlawfully that restrictions this entity or department funds or fees from citizens. The City shall ensure that accurate records of each transaction are maintained in a professional and business like manner and are available to the public upon records under the provisions of this ordinance. Failure of an entity to comply with these provisions shall be grounds for terminating the contract or for imposing a fine of $1,000 per violation per day. Any person or entity who is aggrieved by a decision of any officer or employee or any entity during the performance of his or her duties, and who believes that a violation of this ordinance has occurred may file a complaint with the Ethics Commission pursuant to the provisions of Section 67.21 of this Ordinance. The complaint shall specify the name of the officer or employee or entity alleged to have committed the violation. The complaint shall also specify the nature of the violation and the approximate date it occurred. The Ethics Commission shall not hear complaints concerning violations that occurred more than one year prior to the date the complaint was filed. (Added by Proposition O, 11/4/96)

Sec. 67.29. The Sunshine Ordinance Task Force.

(a) There is hereby established a task force to be known as the Sunshine Ordinance Task Force consisting of seven voting members appointed by the Board of Supervisors. All members must have experience and/or interest in matters relating to the laws of citizen access and participation in the governmental process. Two members shall be appointed from individuals whose names have been submitted by the local chapter of the Society of Professional Journalists, one of whom shall be an attorney and one of whom shall be a lawful journalist. One member shall be appointed from the press or electronic media. One member shall be appointed from individuals whose names have been submitted by the local chapter of the League of Women Voters. Four members shall be members of the public who have demonstrated interest as to how anywhere in the issues of citizen access and participation in local government. Two members shall be members of the public experienced in the computer advocacy. One member shall be a journalist from a varied interdisciplinary background. No person who is not registered to vote in San Francisco may serve on the Task Force. Members shall serve without compensation.

(b) Members shall be appointed for terms of two years each. Members may be removed by the Board of Supervisors. In the event of each removal or in the event a vacancy otherwise occurs during the term of office of any appointed member, a successor shall be appointed for the unexpired term of the office created in a manner similar to the described funds for the initial members. The task force shall elect a chair from among its appointed members. The term of office as chair shall be two years. Members of the task force shall serve without compensation.

(c) The task force shall advise the Board of Supervisors and provide information to other City departments upon request as to ways in which to implement this chapter. The task force shall develop appropriate guides to ensure implementation of this chapter by all departments. The task force shall review and process the complaints filed with the Board of Supervisors under section 67.30 of this chapter. The task force shall report to the Board of Supervisors at least once annually on any procedural or policy problems encountered in the administration of this chapter. The Task Force may hold public hearings regarding noncompliance by departments and may request departments or witnesses to appear before the task force to testify concerning matters within the jurisdiction of the Task Force. The Task Force shall review petitions for a municipal office who endorsement powers over this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that certain provisions of the Sunshine Ordinance or the California Public Records Act or the Brown Act should be amended or deleted, it may forward to the Board of Supervisors proposed legislation amending those laws with the reasons for such proposed changes. The Task Force shall have the authority to request the City Attorney or the Deputy City Attorney to issue written opinions.

(d) The Ethics Commission shall provide the Task Force with appropriate Sunshine Ordinance.

The Task Force Commission shall appoint a subcommittee consisting of equally members to hear complaints alleged to be violations or on the People of San Francisco shall under upon it by Section 67.30 of this Ordinance. (Added by Ord. 585-93, App. 8/1/93; amended by Ord. 108-94, App. 3/18/94; Ord. 436-96, App. 12/19/96; Ord. 348-98, App. 8/7/98; Ord. 287-98, App. 10/9/98; Proposition O, 11/4/96)

Sec. 67.30. Responsibility For Administration.

The Mayor shall administer and coordinate the implementation of the provisions of this chapter for departments under his or her control. The Mayor shall administer and coordinate the implementation of the provisions of this chapter for departments under his or her control. The Board of Supervisors shall administer and coordinate the implementation of the provisions of this chapter for departments under their respective control. The Clerk of the Board of Supervisors shall provide a full-time staff person to perform administrative duties for the Sunshine Ordinance Task Force and to assist any person in public meetings and public information. The Clerk of the Board of Supervisors shall provide the staff person with whatever facilities and equipment are necessary to perform said duties. (Added by Ord. 585-93, App. 8/1/93; amended by Ord. 287-98, App. 7/10/98; Proposition O, 11/4/96)

Sec. 67.30-1. Provision Of Copies And/or Sensitive Equipment.

It is the policy of the City and County of San Francisco to ensure opportunities for informed civic participation by individuals in all local, state, regional and federal agencies and institutions with which it maintains continuing legal and political relationships. Officers, agents and other representatives of the City and County, particularly at meetings, public information and citizen comment activities by those agencies and institutions, including but not limited to the Presidio Trust, the San Francisco Unified School District, the San Francisco Community College District, the San Francisco Transportation Authority, the San Francisco Housing Authority, the San Francisco Redevelopment Authority and the University of California. To the extent not expressly prohibited by law, copies of all written communications by the above listed institutions and any City employee, officer, agents, or and representatives, shall be accessible as public records. To the extent not expressly prohibited by law, upon viewing of the governing body of any such agency and institutions at which City officials, agents or representatives are present in their official capacities shall be open to the public, and this provision cannot be evaded by any City officer, agent or representative. The City shall give out validity to money, tax statements, land, or services to any private entity unless that private entity agrees in writing to provide the city with financial projections (including costs and loss forecast), and annual audited financial statements for the project thereafter, for the project upon which the entity is based and all such projections and financial statements shall be public records that must be disclosed. (Added by Proposition O, 11/4/96)

Sec. 67.33. Department Head Deductions.

(a) Any department heads and all City management employees and employees or officials who are required to sign an affidavit of financial interest with the Ethics Commission shall sign an annual affidavit or declaration stating under penalty of perjury that they have read the Sunshine Ordinance and have attended or will attend when next offered, attending seminar on the Sunshine Ordinance, to be held at least

more annually. The affidavit or declaration shall be maintained by the Ethics Commission and shall be available as a public record. Annual training shall be provided by the San Francisco City Attorney's Office with the assistance of the Sunshine Ordinance Task Force. (Added by Proposition O, 11/4/97)

Sec. 67.34. Willful Failure Shall Be Official Misconduct.

The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission. (Added by Proposition O, 11/4/97)

Sec. 67.35. Enforcement Provisions.

(a) Any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance or to enforce his or her right to attend any meeting required under this Ordinance to be open, or to correct such meeting to be open.

(b) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought to enforce this Ordinance.

(c) If a court finds that an action filed pursuant to this section is frivolous, the City and County may award to the defendant reasonable attorneys' fees and costs.

(d) Any person may institute proceedings for enforcement and penalties under this section in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 21 days after a complaint is filed. (Added by Proposition O, 11/4/97)

Sec. 67.36. Sunshine Ordinance Supersedes Other Local Laws.

The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply. (Added by Proposition O, 11/4/97)

Sec. 67.37. Severability.

The provisions of this chapter are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this chapter, or the invalidity of the application thereof to any person or circumstances, shall not affect the validity of the remainder of this chapter, or the validity of its application to other persons or circumstances. (Added by Ord. 161-93, App. 6/18/93; amended by Proposition O, 11/4/97)

Sec. 67.a. Prohibiting The Use Of Cell Phones, Pagers And Similar Sound-Producing Electronic Devices At Duly Noticed Public Meetings.

At and during a public meeting of any policy body governed by the San Francisco Sunshine Ordinance, the ringing and use of cell phones, pagers and similar sound-producing electronic devices shall be prohibited. The presiding officer of any public meeting which is disrupted may order the removal from the room (or muting room of any person(s) responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices. The presiding officer may allow an expelled person to return to the public meeting following an agreement by the expelled person to comply with the provisions of this Section. A warning of the provisions of this Section shall be printed on all meeting agendas, and shall be explained at the beginning of each public meeting by the presiding officer. (Added by Ord. 188-00, File No. 000439, App. 10/13/2000)

San Francisco Sunshine Ordinance Task Force

PUBLIC COMPLAINT PROCEDURE

Consistent with the language and spirit of the San Francisco Sunshine Ordinance (Ordinance) to provide the most open government possible (see City Administrative Code Section (§) 67.1), all inferences and evidence shall be viewed in the light most favorable to the petitioner.

Revised 4/26/2005, Revised as to form 5/22/2007, 3/25/2008 & 4/28/09

The Sunshine Ordinance Task Force (SOTF) has an obligation under San Francisco Administrative Code §§67.21 (e), 67.30(c) and 12L.1-10 to respond to public complaints.

A. Inquiries in Person or by Phone

It is the goal of the SOTF to help the public gain access to public records and meetings. The staff of the SOTF will therefore work with members of the public to help achieve such access in order to avoid the need for filing complaints with the SOTF.

1. The Administrator shall discuss the request with the member of the public and attempt, with the assistance of the City Attorney, to mediate the request.

2. If unable to facilitate access to a desired record or to a public meeting, the SOTF staff shall advise the members of the public of his/her right to file a petition with the Supervisor of Records (the City Attorney's Office) and to pursue the SOTF complaint process, and shall send the complainant a packet of information regarding the complaint process.

B. Filing a Complaint with the SOTF

1. A letter or complaint form may be submitted to the SOTF via mail, fax or electronic mail (email), or in person. If a complaint letter is received, the Administrator shall complete a complaint form and send a copy to the complainant for their review. The complaint form shall include a box to indicate if the complainant wants a public hearing before the Task Force or a pre-hearing conference before the Complaint Committee to focus the complaint or to otherwise assist the parties to the complaint. Once filed a copy of the complaint shall be sent to the Chairs of the full Task Force and Complaint Committee, and the SOTF Deputy City Attorney.

2. Upon filing a complaint, the complainant shall be given a condensed checklist of procedural requirements (i.e. complaint process, documentation deadlines, etc.). The responding City department/agency (respondent) shall be sent written notice of the complaint with a checklist of procedures, with a request to respond to the charges in the complaint within 5 business days. The Deputy City Attorney who advises City departments/agencies may assist the respondent in preparing a response to the complaint. (See Addendum)

3. Hearing Schedule:
   (a) If the responding City department (respondent) does not contest jurisdiction or there is no request for a pre-hearing conference to focus the complaint or otherwise assist the parties to the complaint, a hearing will be scheduled with the Full Task Force.
   (b) If the responding City department (respondent) contests jurisdiction or there is a request for a pre-hearing conference to focus the complaint or otherwise assist the parties to the complaint a hearing will be scheduled with the Complaint Committee prior to the hearing before the Full Task Force.

4. The Administrator shall advise the complainant and the affected department/agency of the date, time and location of the Complaint Committee and/or Full Task Force meetings at which the complaint will be discussed. The respondent shall have a knowledgeable representative and/or its custodian of records at the meeting. The Administrator shall inform both parties of the deadline to submit any supporting documentation. Both parties shall be held to the stated deadlines: five working days before the hearing.

5. The Administrator shall gather all relevant documents prior to the forthcoming hearing/s and shall send the documents to the members for their review. When the documents exceed 75 pages, the complaint will be forwarded without its full exhibits, with an indication that the full exhibits are on file with the Administrator.

6. Complaint Committee Hearings:
   (a.) The SOTF Deputy City Attorney, shall provide a written opinion to the Complaint Committee as to whether the SOTF has jurisdiction over the complaint.
   (b.) The Complaint Committee shall review a complaint where jurisdiction is contested or a pre-hearing conference is requested at its next meeting and recommend whether the SOTF has jurisdiction. The Committee shall also focus the issues for the complainant, respondent and SOTF, or otherwise assist the parties.

7. When the Complaint Committee recommends accepting jurisdiction, it shall do so at the next regular SOTF meeting unless this would result in a violation of the 45-day time limit for resolving complaints (mandated by §67.21); in such a case, a special meeting shall be called to hear the matter. The complainant may waive the 45-day rule or request a special hearing within the 45-day period.

8. Continuances:
   (a) A complainant may waive the 45-day rule and if a request for continuance is submitted at least three business days in advance of the scheduled hearing it shall be granted. For requests submitted less than three business days in advance or for requests for subsequent continuances, the request shall be granted by a simple majority vote of the members present.
   (b) If a respondent submits a request for continuance at least three business days in advance, upon agreement of the complainant the continuance shall be granted. If the complainant does not agree to the continuance, the request for continuance is not made within three business days, or the respondent is requesting a subsequent continuance, such continuance shall be granted by a simple majority vote of the members present. (Adopted 5/22/07)

C. Public Hearing Procedure

If jurisdiction is not contested or the Complaint Committee recommends jurisdiction, the complainant and respondent shall receive a written notice of the specific issues that shall be before the SOTF for a hearing, and they shall be advised to submit any evidence no later than 5 working days prior to the hearing.

Documentation
For a document to be considered, it must be received at least 5 working days before the hearing (Tuesday before the actual meeting). At the hearing before the Task Force, should the complainant submit additional documentation that has not been submitted to all parties, he or she shall be given the following options:

(1) Proceed with the hearing without SOTF consideration of the additional documentation;

(2) Waive his/her right to a hearing within 45 days and ask for the hearing to be continued; but

(3) If the additional documentation raises a new issue, the complainant may

- proceed with the hearing and file a new complaint on the additional issue(s), or
- withdraw and amend the complaint to include the new issue(s).

D. Hearing and Findings of the Task Force

1. Prior to the meeting, the SOTF Deputy City Attorney shall prepare an instructional letter to assist the SOTF in understanding the issues. All members of the SOTF are responsible for being familiar with the complaint issues prior to the meeting.

2. The SOTF shall conduct the public hearing with the complainant and respondent present.

3. After hearing all testimony, the SOTF shall vote on an Order of Determination or other directives written by the Chair of behalf of the Task Force stating whether the record is public and/or whether the open meeting laws were obeyed.

4. After the SOTF determines a course of action, the complainant and respondent shall be notified in writing.

E. Reconsideration of Task Force Findings

1. Within 10 days of receipt ~~issuance~~ of the Order of Determination, either the complainant or respondent may petition the SOTF for a reconsideration only if information exists that was not available at the time of the hearing and the petitioning party must present an offer of proof as to the new information.

2. The Task Force shall consider the petition at its next scheduled meeting. If a petition for reconsideration is granted, a new hearing on the complaint shall be scheduled at the next SOTF meeting. (Approved by Task Force 10/26/04)

F. Department to Comply with Determination of the SOTF

1. The Administrator shall send the Order of Determination to the complainant and the respondent and request a written response within 5 days of the receipt of the Order and as necessary request a written response, which shall be monitored by the SOTF Compliance and Amendments Committee and/or any committee recommended by the Chair. If a public records violation is found, the custodian of records shall be ordered to provide the record to the complainant within 5 days after the issuance of the Order of Determination. The Compliance and Amendments Committee shall review whether there has been compliance with the Order of Determination.

2. If there is a failure to comply, the Compliance and Amendments Committee may recommend that the SOTF notify the District Attorney, the California Attorney General, the Board of Supervisors and/or the Ethics Commission, who may take measures they deem necessary to ensure compliance with the Ordinance. A copy of the Order of Determination shall be included with such notification.

3. If appropriate, the respondent and complainant shall be sent a notice that the District Attorney, California Attorney General, Board of Supervisors and Ethics Commission have been contacted, and of the complainant's independent right to pursue the issue in court.

G. Documentation and Information Regarding Individual Complaints:

1. The Administrator shall keep a file of all documents and a log of all petitions filed with the SOTF, including the date of each petition, the department/agency against which it was made, the nature of the complaint and its status. This shall be in compliance with its records and retention schedule.

2. Copies of all correspondence relating to a complaint shall be sent to all parties.

Addendum

Complaint Process

1. You may fill out a complaint form online or access a form at sfgov.org/site/sunshine, or you may send your own letter filing a formal complaint. File the complaint with the Sunshine Ordinance Task Force, 1 Dr. Carlton B. Goodlett Pl., Room 244, San Francisco, CA 94102-4689; or you may send it by fax to (415) 554-7854 or email to sotf@sfgov.org.

2. After you file a complaint, the Complaint Committee of the Sunshine Ordinance Task Force (SOTF) shall, if jurisdiction is contested and/or a request for a pre-hearing conference is received, review it to determine if the SOTF has jurisdiction and to focus on the relevant issues in the case.

   - Jurisdiction is defined as the authority to address a given issue(s), as specified in the Sunshine Ordinance.

3. If the Complaint Committee finds no jurisdiction over the violations alleged in the complaint, the complainant is notified of the decision and the complainant may request reconsideration before the SOTF at its next scheduled meeting. Should the SOTF find jurisdiction, a full hearing on the merits will be scheduled.

4. If the Complaint Committee finds the SOTF has jurisdiction, the complainant, respondent and SOTF members are notified of the decision.

5. The complaint is then scheduled for a hearing at the next meeting of the SOTF, which has the final say on the jurisdiction issue.

6. If additional information is to be submitted by the complainant or respondent, it must be submitted to the Administrator at least five working days before the scheduled hearing before the Task Force.

   If either party submits additional material after the deadline, they will be informed that
   a. The Task Force may proceed without considering the new material.
   b. The complainant may waive the 45-day time limit and continue the hearing to the next Task Force meeting.
   c. The complainant may withdraw the complaint and file a new complaint.
   d. The complainant may proceed to hearing with their current complaint and file a new complaint and use the new information to support the freestanding separate complaint.

7. After the public hearing, the Task Force may make an Order of Determination regarding the complaint.

8. For further information, contact the Sunshine Ordinance Task Force Administrator, at (415) 554-7724.

San Francisco
Ethics Commission

25 Van Ness Ave., Suite 220
San Francisco, CA 94102
Phone 252-3100 Fax 252-3112

ETHICS COMMISSION REGULATIONS FOR HANDLING VIOLATIONS OF THE SUNSHINE ORDINANCE

Effective Date: January 25, 2013
Includes amendments effective November 22, 2013

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CHAPTER ONE

I. PREAMBLE

Pursuant to San Francisco Charter, section 15.102, the San Francisco Ethics Commission promulgates these Regulations in order to ensure compliance with the San Francisco Sunshine Ordinance, San Francisco Administration Code, section 67.1, et seq. These Regulations shall apply to complaints alleging violations of the Sunshine Ordinance. All complaints alleging violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other governmental ethics laws shall be handled separately under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

A. "Brown Act" means California Government Code section 54950, et seq.

B. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.

C. "California Public Records Act" means California Government Code section 6250, et seq.

D. "City" means the City and County of San Francisco.

E. "City officer" means any officer identified in San Francisco Administrative Code Section 1.50, as well as any City body composed entirely of such officers.

F. "Commission" means the Ethics Commission.

G. "Complaint" means a Task Force referral or a referral from the Supervisor of Records, a written document submitted directly to the Ethics Commission alleging a violation of the Sunshine Ordinance, or a matter initiated by Ethics Commission staff alleging a violation of the Sunshine Ordinance.

H. "Complainant" means a person or entity that initiated a matter with the Task Force, Supervisor of Records, or Commission alleging a violation of the Sunshine Ordinance. "Complainant" shall also mean the Commission if the matter was initiated by Commission staff.

I. "Custodian" means a City officer or employee having custody of any public record.

J. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.

K. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity. The Commission, the Executive Director, the Task Force, a Respondent, or the Complainant receiving material may consent to any other means of delivery, including delivery by e-mail or fax. In any proceeding, the Commission Chairperson may order that the delivery of briefs or other materials be accomplished by e-mail.

L. "Elected official" shall mean the Mayor, a Member of the Board of Supervisors, City Attorney, District Attorney, Treasurer, Sheriff, Assessor, Public Defender, a Member of the Board of Education of the San Francisco Unified School District, and a Member of the Governing Board of the San Francisco Community College District.

M. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.

N. "Exculpatory information" means information tending to show that the Respondent has not committed the alleged violation(s).

O. "Order of Determination" means: 1) an order from the Task Force that forms the basis of a show cause hearing for Task Force referrals made under Sunshine Ordinance section 67.30(c); or 2) a final recommendation issued by the Task Force, made pursuant to Sunshine Ordinance section 67.34, that a willful violation of the Sunshine Ordinance by an elected official or department head occurred.

P. "Public Records" means records as defined in section 6252(e) of the California Public Records Act, which includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics, and/or Sunshine Ordinance section 67.20(b).

Q. "Referral" means a document from the Task Force or Supervisor of Records to the Commission finding a violation of the Sunshine Ordinance.

R. "Respondent" means a City officer or City employee who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance.

S. "Sunshine Ordinance" means San Francisco Administrative Code section 67.1, et seq.

T. "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30.

U. "Willful violation" means an action or failure to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance.

CHAPTER TWO

I. REFERRALS TO THE ETHICS COMMISSION

A. Matters to be heard in a Show Cause Hearing.

1. Under this Chapter, the Ethics Commission will conduct a Show Cause Hearing on any referral, as defined by these Regulations, finding:

a. willful violations of the Sunshine Ordinance by City officers and employees (other than elected officials or department heads), or

b. non-willful violations of the Sunshine Ordinance by elected officials, department heads, or City officers and employees.

2. Complaints alleging willful violations of the Sunshine Ordinance against elected officials and department heads shall be handled pursuant to Chapter Three of these regulations.

B. Scheduling of Show Cause Hearing.

1. After receipt of a referral, the Commission shall schedule a Show Cause Hearing on the matter at the next regular Ethics Commission meeting, provided that the Show Cause Hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.

2. In the event that four or more Commissioners will not be present at the scheduled Show Cause Hearing, the Commission may reschedule or continue to the next practicable regular Ethics Commission meeting.

II. SHOW CAUSE HEARING

A. Public Hearing. The Show Cause Hearing shall be open to the public.

B. Standard of Proof. The Respondent(s) shall have the burden to show that he or she did not commit a violation of the Sunshine Ordinance.

C. Hearing Procedures.

1. Each Respondent and Complainant may speak on his or her own behalf, subject to the following time limits: each Respondent shall be permitted a five-minute statement; each Complainant shall be permitted a five-minute statement; and each Respondent shall be permitted a three-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.

2. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Each Respondent and Complainant may submit any documents to the Commission to support his or her position. Each party's written submission shall not exceed five pages, excluding supporting documents. Any documents so provided shall also be provided to the opposing party and shall be delivered to the Commission no later than five business days prior to the scheduled hearing. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail. Commissioners may question each party or any other person providing testimony regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.

3. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence.

D. Deliberations and Findings.

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. To determine that a violation of the Sunshine Ordinance did not occur, the Commission must conclude that, based on a preponderance of the evidence, the Respondent did not commit a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has not committed a violation of the Sunshine Ordinance. The finding that a Respondent did or did not commit a violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

E. Ethics Commission Orders.

1. If the Commission finds that a Respondent committed a violation of the Sunshine Ordinance, the Commission may issue orders requiring any or all of the following:

a. the Respondent(s) to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) violated the Sunshine Ordinance; and/or

c. The Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, or upon a finding of no violation, the Commission will take no further action on the matter.

F. Public Announcement.

Once the Commission determines that the Respondent did or did not commit a violation of the Sunshine Ordinance, the Commission will publicly announce this conclusion. The Commission's announcement may, but need not, include findings of law and fact.

CHAPTER THREE

I. COMPLAINTS ALLEGING WILLFUL VIOLATIONS OF THE SUNSHINE ORDINANCE BY ELECTED OFFICIALS OR DEPARTMENT HEADS OR COMPLAINTS FILED DIRECTLY WITH THE ETHICS COMMISSION ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE.

A. Matters heard under this Chapter.

1. Pursuant to Sunshine Ordinance, section 67.34, the Ethics Commission shall handle complaints alleging violations of the Sunshine Ordinance by an elected official or department head.

2. Pursuant to Sunshine Ordinance, section 67.35(d), if the District Attorney and/or Attorney General take no action for 40 days after receiving notification of a custodian's failure to comply with an order made pursuant to Sunshine Ordinance section 67.21(d) or (e), then the person who made the public record request may file a complaint directly with the Ethics Commission relating to that failure to comply.

3. Ethics Commission staff may initiate a complaint to allege a violation of the Sunshine Ordinance against any City officer or City employee.

4. This Chapter will govern:

a. referrals alleging willful violations of the Sunshine Ordinance against an elected official or department head, and

b. complaints initiated under subsections A.2 or A.3 alleging violations of the Sunshine Ordinance by any City officer or employee.

5. Any referral that does not allege a willful violation of the Sunshine Ordinance against an elected official or a department head shall be handled pursuant to Chapter Two of these regulations.

B. Scheduling of Hearing.

1. When the Executive Director receives a referral alleging a willful violation of the Sunshine Ordinance against an elected official or a department head, or when the Executive Director receives a complaint filed under subsection A.2, or when staff initiates a complaint under subsection A.3, the Executive Director shall, within 15 business days of the conclusion of his or her investigation, schedule a public hearing at the next regular meeting of the Commission, unless impracticable, provided that the hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.

2. Within 15 business days of the conclusion of his or her investigation, the Executive Director shall issue a written notice and his or her report and recommendation pursuant to Chapter Three, section II.C, to each Commission member, each Respondent, and each Complainant, including the date, time and location of the hearing.

3. In the case of a referral, the Executive Director also shall provide a courtesy notice and a copy of the report and recommendation to the referring body.

II. INVESTIGATION AND RECOMMENDATION

A. Factual Investigation.

Upon receipt of a complaint, the Executive Director shall conduct a factual investigation. The Executive Director's investigation may include, but shall not be limited to, interviews of the Respondent(s) and any witnesses, as well as the review of documentary and other evidence. The investigation shall be concluded within 30 days following the Executive Director's receipt of the complaint. The Executive Director may extend the time for good cause, including but not limited to: staffing levels; the number of other pending complaints under these Regulations or the Ethics Commission Regulations for Investigations and Enforcement Proceedings; other Ethics Commission proceedings; other staffing needs associated with pending campaigns; or the cooperation of witnesses, Complainants or Respondents. If the Executive Director extends the time for the investigation to conclude, his or her reasons for the extension shall be included in the report to the Ethics Commission.

B. Subpoenas.

During an investigation, the Executive Director may compel by subpoena the testimony of witnesses and the production of documents relevant to the investigation.

C. Report and Recommendation.

1. After the Executive Director has completed his or her investigation, the Executive Director shall prepare a written report and recommendation summarizing his or her factual and legal findings. The recommendation shall contain a summary of the relevant legal provisions and the evidence gathered through the Commission's investigation. To support the report and recommendation, the Executive Director may submit evidence through declaration. The report and recommendation shall not exceed ten pages excluding attachments.

2. The report shall recommend one of the following:

a. that Respondent(s) willfully violated the Sunshine Ordinance;

b. that Respondent(s) violated the Sunshine Ordinance but the violation was not willful; or

c. that Respondent(s) did not violate the Sunshine Ordinance.

D. Response to the Report and Recommendation.

1. Each Complainant and Respondent may submit a written response to the Director's report and recommendation. The response may contain legal arguments, a summary of evidence, and any mitigating or aggravating information. In support of the response, each Complainant and Respondent may submit evidence through declaration. The response shall not exceed ten pages excluding attachments.

2. If any Complainant or Respondent submits a response, he or she must deliver the response to all parties no later than five business days prior to the date of the hearing. The Complainant or Respondent must deliver eight copies of the response to the Executive Director, who must then immediately distribute copies of the response(s) to the Commission and any other Complainant or Respondent. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail.

III. PUBLIC HEARING

A. General Rules and Procedures.

1. The hearing shall be open to the public.

2. Each Complainant and Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.

3. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Commissioners may question each party regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.

4. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, Section I.E, then the Commission may make a decision in the party's absence.

5. Except when a complaint is staff-initiated or initiated pursuant to section 67.35(d), the Executive Director's role at the hearing will be limited to providing the report containing the legal and factual basis for his or her recommendation to the Commission and to respond to questions from the Commissioners.

B. Deliberations and Findings.

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance. The finding of a willful violation or non-willful violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

C. Ethics Commission Orders.

1. If the Commission finds that an elected official or a department head willfully violated the Sunshine Ordinance, the Commission shall so inform the Respondent's appointing authority, or the Mayor if Respondent is an elected official. In addition, the Commission may issue orders requiring any or all of the following if it finds that an elected official, a department head, or any City officer or City employee committed a violation of the Sunshine Ordinance:

a. the Respondent to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent violated the Sunshine Ordinance; and/or

c. the Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority, or the Mayor if the Respondent is an elected official, of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, the Commission will take no further action on the matter.

D. Finding of No Violation.

If the Commission determines that there is insufficient evidence to establish that the Respondent has committed a violation of the Sunshine Ordinance, the Commission shall publicly announce this fact. The Commission's announcement may, but need not, include findings of law and fact. Thereafter, the Commission will take no further action on the matter.

CHAPTER FOUR

I. MISCELLANEOUS PROVISIONS

A. Ex Parte Communications.

Once a complaint is filed with the Commission, no Commissioner shall engage in oral or written communications outside of a Commission meeting regarding the merits of the complaint with the Commission's staff, the Respondent(s), the Complainant(s), any member of the Task Force, the Supervisor of Records, any member of the public, or any person communicating on behalf of the Respondent(s), Complainant(s), the Supervisor of Records, or any member of the Task Force, except for communications, such as scheduling matters, generally conducted between a court and a party appearing before that court.

B. Access to Complaints and Related Documents and Deliberations.

Complaints, investigative files and information contained therein, shall be disclosed as necessary to the conduct of an investigation or as required by the California Public Records Act or the San Francisco Sunshine Ordinance. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff regarding complaints shall not be disclosed until the Commission has issued its final decision following the hearing.

C. Oaths and Affirmations.

The Commission may administer oaths and affirmations.

D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission and the public of the designation no later than the next business day.

E. Extensions of Time and Continuances.

1. Any Respondent or Complainant may request the continuance of a hearing date in writing. The requester must deliver the written request to the Commission Chairperson, and provide a copy of the request to all other parties no later than ten business days before the date of the hearing. The Commission Chairperson shall have the discretion to consider untimely requests. The Commission Chairperson shall approve or deny the request within five business days of the submission of the request. The Commission Chairperson may grant the request upon a showing of good cause.

2. The Commission or the Commission Chairperson may reschedule a hearing at their discretion for good cause.

At any time a hearing is placed on an agenda regarding a matter under Chapter II or III of these Regulations, four or more members must be in attendance. Otherwise, the hearing shall be continued to the next regular Ethics Commission meeting, unless impracticable.

F. Place of Delivery.

1. Whenever these Regulations require delivery to the Commission, its members, or the Executive Director, delivery shall be effected at the Commission office.

2. Whenever these Regulations require delivery to a Respondent or Complainant, delivery shall be effective and sufficient if made by U.S. mail, personal delivery or any other means of delivery agreed upon by the parties under Chapter One, section II, subsection K, to an address reasonably calculated to give notice to and reach the Respondent or Complainant.

3. Delivery is effective upon the date of delivery, not the date of receipt.

4. Delivery of documents to the Commission may be conducted via electronic mail after a written request is made and approved by the Executive Director.

G. Page Limitations and Format Requirements.

Whenever these Regulations impose a page limitation, a "page" means one side of an 8½ inch by 11 inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double-spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

H. Conclusion of Hearing.

For the purposes of these Regulations, a hearing concludes on the date on which the Commission announces its decision.

I. Complaints alleging both Sunshine Violations and Violations Handled Under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

If a complaint alleges both violations of the Sunshine Ordinance and violations handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings, the allegations involving violations of the Sunshine Ordinance shall be handled separately under these Regulations. Staff shall initiate a complaint of the alleged violations of the Sunshine Ordinance under Chapter Three, Section I.A.3 of these Regulations.

J. Certification by participating Commissioner if he or she did not attend proceedings held under Chapter II or III in their entirety.

Each Commissioner who participates in a decision, but who did not attend the hearing in its entirety, shall certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

II. SEVERABILITY

If any provision of these Regulations, or the application thereof, to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

Good Government Guide

An Overview of the Laws Governing
the Conduct of Public Officials

2010–11 Edition

Dennis J. Herrera
City Attorney of San Francisco

Part three: Public records & meetings laws

"The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it."

—President John F. Kennedy
Address before the American Newspaper Publishers Association, April 27, 1961

I. Introduction

Good government in our democracy is premised on informed and engaged citizenship, and our ability to govern can never be better or more effective than laws intended to assure the broadest possible public access to government proceedings and records. The policy objective underlying public records and open meeting laws is that citizens share a fundamental right to access information concerning the conduct of their government, and that governmental entities should make their policy decisions openly and with the full benefit of public participation.

As strongly as we in the City Attorney's Office encourage our clients to be thoroughly familiar with laws governing public records and open meetings, we urge, too, that these laws be embraced in the aspirational spirit of openness, transparency and accountability that animate them. Public service means being ever mindful of the public's right to be informed about and to participate in our democracy. Citizens who petition public officials and employees—whether to share ideas, to criticize, to seek information, or to request public records—deserve respect and appreciation for fulfilling a civic duty no less important to San Francisco's government than our own.

As with almost every area of law, there are no absolutes; exceptions exist in open meetings laws and public records laws to accommodate occasionally competing protected rights of privacy and confidentiality. But these exceptions are generally narrow. Violations of open

government laws are more likely to occur from ignorance or confusion than from deliberate intent. But it is important to understand that even unwitting violations may be legitimately viewed with suspicion. They invite criticism and undermine the credibility of City departments and policy bodies. Also, there can be substantial costs and penalties for violating these laws.

We encourage all policy body members and department personnel to thoroughly familiarize themselves with public records and open meeting laws by carefully reading this part of the Good Government Guide, and by taking part in the trainings that the City Attorney's Office offers. We also encourage City officials and employees to contact the City Attorney's Office in advance whenever they have questions regarding public records or meetings.

II. Legal overview

This part of the Good Government Guide is intended to familiarize department heads, City personnel, and members of City boards, commissions, and other bodies with State and local laws governing the public's right of access to City records and meetings conducted by certain City bodies. We address the four major laws that promote open government in San Francisco:

- The California Public Records Act (Govt. Code §§ 6250 et seq.) is the State law governing public access to the records of State and local agencies.
- The Ralph M. Brown Act (Govt. Code §§ 54950 et seq.) is the State law governing meetings of local governmental boards, commissions, and other multi-member bodies.
- The San Francisco Charter imposes additional requirements on the conduct of City boards, commissions, departments, and officials.
- The San Francisco Sunshine Ordinance (Admin. Code Chapter 67) imposes additional requirements on City government affecting both the public's access to records and the conduct of meetings of boards, commissions, and other bodies. The Sunshine Ordinance refers to City boards, commissions and most other multi-member policymaking and advisory bodies as "policy bodies." The Board of Supervisors enacted the Sunshine Ordinance in 1993 and the voters substantially amended it in 1999.

In addition to these four main laws, we address other provisions of State and City law that pertain to open government in San Francisco.

For the convenience of the reader, this part of the Guide provides citations for reference to a number of provisions of law. Our citations to these and other codes are not intended to suggest that they are the only sources of legal authority regarding public records and open meeting issues. Court cases, opinions of the California Attorney General and the City Attorney, and other sources of federal, state, and local law may be relevant to a particular situation.

A. Open government laws at the state and local levels

There is considerable overlap between State open government laws and City laws, including the Sunshine Ordinance. Where it is helpful, this Guide draws distinctions between State and City law requirements. But often the Guide does not draw such distinctions. Where State and City laws differ, the general rule is that the City must follow the more rigorous standard promoting greater access to public records and meetings of policy bodies. We thus often focus only on that legal standard.

Some public agencies that may be affiliated with but are legally distinct from the City are not subject to the Sunshine Ordinance. These agencies include the San Francisco Unified School District, San Francisco Community College District, San Francisco Redevelopment Agency, San Francisco County Transportation Authority, San Francisco Health Authority, San Francisco Housing Authority, San Francisco In-Home Supportive Services Public Authority, San Francisco Local Agency Formation Commission, San Francisco Parking Authority, and the Treasure Island Development Authority. They are subject only to the Public Records Act, the Brown Act (or other similar open meeting law), and, in some cases, other State laws governing public meetings and public records specific to the agency. But, although the Sunshine Ordinance does not of its own force apply to them, some of these agencies have chosen to follow some or all of its requirements.

B. Proposition 59

In 2004, California voters adopted Proposition 59, an amendment to Article I, section 3 of the California Constitution. Proposition 59 creates a general constitutional right of access to public records and meetings. But it also states that it does not repeal or nullify existing statutory or constitutional restrictions on access to public records and meetings and does not supersede or modify the right of privacy recognized in the California Constitution. It is therefore not completely clear what impact Proposition 59 has on access to public records and meetings, particularly in San Francisco, where the Sunshine Ordinance already provides for greater openness in government than State law requires. Courts and the Attorney General have generally found that Proposition 59 does not create new rights of public access to records and meetings but instead constitutionalizes existing rights under State law.

The underlying policy of the public records laws is that access to information concerning the conduct of the government's business is a fundamental right of each citizen. Govt. Code § 6250; Admin. Code § 67.1. The parallel purpose of the open meeting laws is to ensure that policy bodies make decisions openly and with the public's participation. Govt. Code § 54950; Admin. Code § 67.1. Proposition 59 thus highlights what both State and City law have long recognized: Conscientious adherence to open government laws is essential to democratic self-governance.

C. Underlying principles of open government laws

The premise of both the Public Records Act and the Sunshine Ordinance is that records in the possession of government generally belong to the people. Absent some specific and limited exceptions, City agencies must make those records available for the public to inspect, copy, or do both. This section outlines the disclosure requirements and procedures mandated by the Public Records Act and the Sunshine Ordinance. It also addresses other provisions of the Sunshine Ordinance or other City laws that make available to the public certain types of information.

D. Definition of a public record

The Public Records Act defines a "public record" very broadly. The definition has three elements:

- Any writing, regardless of physical form or characteristics.
- Containing information relating to the conduct of the public's business.
- Prepared, owned, used, or retained by a state or local agency.

Govt. Code § 6252(e). The first element defines a "record." The second and third elements define what makes the record "public." The Sunshine Ordinance adopts this definition of "public record." Admin. Code § 67.20(b).

The first element of the definition of public record—that it is a "writing"—is immensely expansive. It encompasses any handwriting, typewriting, printing, photostating, photographing, photocopying, transmission by e-mail or fax, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols. Govt. Code § 6252(g). This concept of a writing goes beyond the traditional written form. It may consist of any medium that contains encoded information, such as a computer tape, video recording, cassette recording, voicemail, text message, photograph, or movie. E-mails including attachments are writings within the meaning of the Public Records Act.

The second element of the definition of public record—that it contain information "relating to the conduct of the public's business"—is also expansive, though it has some limits. For example, an employee's grocery shopping list, kept in an office desk drawer, is not a public record because it does not contain information about the workings of City government.

The third element of the definition—that a public record is "prepared, owned, used, or retained by a state or local agency"—is expansive, too. In particular, there may be cases where the City does not own a record that is nonetheless considered a public record. Courts have not definitively resolved the issue, but City officials and employees should assume that work they perform for the City on personal computers or other personal communications devices may be subject to disclosure under the public records laws. Such a record meets the first two elements of the definition of public record; the remaining question is whether, under the circumstances, the law would consider the record prepared or used by the City.

There are a few exceptions to the definition of public record. For example, computer software that the City develops is not a public record. Govt. Code §6254.9(a); Admin. Code § 67.20(b). But the large majority of records in the City's possession are. Legal issues concerning disclosure typically center not on whether the record is a public record, but on whether a specific law authorizes or requires the City to withhold or redact the record.

E. The public records request

In some cases, City personnel may have difficulty recognizing that they have received a public records request or an effort by a member of the public to make a request. The discussion below clarifies when a request triggers the City's obligation to respond.

1. Form of request

A person may make an oral public records request in person or by phone, or submit it in writing by fax, postal delivery, personal delivery, or e-mail. Admin. Code § 67.21(b). Departments must honor oral requests. They may ask but not insist that a request be in writing, to clearly record the timing and content of the request. A sample request form, modeled on the form used by the Clerk of the Board of Supervisors, is found at the end of the Guide.

2. Content of request

A public records request must specify an identifiable record or category of records sought. Govt. Code § 6253(b). The law does not require exactitude in requests, or limit requests to specific records the requester identifies by date, author, and/or recipient. But a request must be sufficiently clear and defined that the department can understand what records are the subject of the request.

The law does not generally allow a requester to look indiscriminately through a department's files where such files are not otherwise made available to members of the public. Accordingly, public records requests may not require access to "all of your records." But public servants should make a conscientious effort to assist requesters in identifying the information or records they seek. Also, neither the Public Records Act nor the Sunshine Ordinance gives a member of the public the right to file a standing request for records that departments may or will create or receive in the future. The Brown Act provides a limited right to file a standing request for future meeting agendas and agenda packets of a policy body. See Section IV(C)(4) below.

A request that a department create a response to a request for information or answer a series of questions is not a public records request, and neither the Public Records Act nor the Sunshine Ordinance requires a department to reply to a series of written questions or interrogatories. Nevertheless, department personnel should make a reasonable effort to assist questioners when public records may exist that would assist in answering written questions.

A public records request need not use special terminology like "this is a public records request" or "this is a request under the Sunshine Ordinance" to be valid. And the use of incorrect terminology, like "this is a Freedom of Information Act request," does not render the request invalid. The request merely needs to make reasonably clear that the requester is seeking identifiable records from the City. And even if the request does not mention the Public Records Act or Sunshine Ordinance, the City must adhere to the requirements of those laws in responding, unless the requester instructs otherwise.

A public records request need not state the reason for the request, and the City may not demand an explanation as a condition of complying with the request. Govt. Code § 6257.5; Admin. Code § 67.25(c). Further, as a general rule, the City must respond to anonymous public records requests, provided they include information sufficient to allow the City to transmit a response to the requester.

3. Types of access to records

A requester may seek to inspect records, or obtain copies of records, or both. Govt. Code §§ 6253(a), (b); Admin. Code §§ 67.21(a), (b). Typically the request itself, or the surrounding circumstances, will make clear the type of access the requester is seeking. If not, the department may seek clarification from the requester.

F. Responding to a public records request

1. Providing assistance to requesters

The Public Records Act requires departments to assist members of the public to identify records and information that are responsive to the request or purpose of the request, if stated; describe the physical location and information technology in which the requested records exist; and provide suggestions for overcoming any practical basis for denying access to the records or information sought. The department will have satisfied these requirements even if it is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester. Govt. Code §§ 6253.1(a), (b).

If a requester has addressed a request to the wrong department, or if the department that received the request knows that another department may have responsive records, the department that received the request typically should inform the requester of the other department(s) that may have responsive records. Admin. Code § 67.21(c). A department should follow this procedure whether or not it has responsive records.

Further, if most of the information in a requested record is exempt from disclosure, the department must inform the requester of other records, if any, that may contain some of the information the requester seeks. Admin. Code § 67.27(d); see also Admin. Code § 67.25(c).

The City's general duty to assist requesters does not entitle departments to require the requester to give a reason for the request or explain how the requester will use the records. Departments may not limit access to a public record otherwise subject to disclosure based

on the purpose for which the record is being requested. Cal. Govt. Code § 6257.5. Accordingly, departments should not routinely make such inquiries. But in some cases, particularly where the request is overly broad or unclear, it may be appropriate to ask about the requester's objectives where the inquiry would help the department identify the records and satisfy the request. Admin. Code § 67.25(c).

2. Providing a description of records

The Sunshine Ordinance allows a person to ask a department for information regarding the existence, quantity, form, and nature of records relating to a particular subject. When requested to do so, the department must respond in writing within seven days. Admin. Code § 67.21(c). The Ordinance does not provide for any time extension to comply with such a request. This procedure enables a person to get enough information relating to a subject to make or refine a public records request. It does not require a department to provide an inventory detailing each record that may pertain to a subject or to create a privilege log detailing records the department has withheld from disclosure in response to a request.

3. Timely response

The City must respond to a public records request promptly. Govt. Code § 6253(b); Admin. Code § 67.21(b). There are two types of requests – standard requests, and immediate disclosure requests – with different response deadlines.

a. Standard requests: 10 calendar days

Unless the requester makes an immediate disclosure request, departments must respond to a request to inspect or copy records within 10 calendar days. But in "unusual circumstances," departments may have up to 14 additional calendar days to respond. The department must inform the requester in writing of the extension within the initial 10-day period, setting forth the reasons for the extension and the date on which a response will be made. Govt. Code § 6253(c). The department need not obtain the requester's consent to invoke an extension of time for one of the specified reasons.

"Unusual circumstances" permitting the extension are limited to the need to do one or more of the following:

- Search for and collect the requested records from facilities separate from the office processing the request.
- Search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request.
- Consult with another department or agency that has a substantial interest in the response to the request.
- As to electronic information, compile data, write programming language or a computer program, or construct a computer report to extract data.

Govt. Code §§ 6253(c). Although departments have 10 days to respond to a standard request, they should respond as promptly as possible and without unreasonable delay. Admin. Code §§ 67.21(a), (b).

b. Immediate disclosure requests: next business day

The Sunshine Ordinance requires a faster response for "immediate disclosure requests." The faster response is required only if the request is in writing. Admin. Code § 67.25(a). In addition, the words "Immediate Disclosure Request" must appear across the top of the request and on the envelope, subject line, or cover sheet transmitting the request. Admin. Code § 67.25(a). These stringent rules for designation of an immediate disclosure request are more than a formality. They are designed to alert departments that an expedited time frame for processing the records request applies.

Immediate disclosure requests must be satisfied no later than the close of business the next business day. Admin. Code § 67.25(a). The department should respond to the requester within that time period by fax or email, if the requester has provided that contact information. If the requester has provided a postal address only, mailing the response within the time period satisfies the deadline. Admin. Code § 67.25(a).

Departments may invoke an extension of no more than 14 calendar days to respond to immediate disclosure requests. Admin. Code § 67.25(b). While the Sunshine Ordinance mentions a 10-day extension period, that provision incorporates an expired provision of the Public Records Act framed in terms of 10 "business days," which is typically equivalent to 14 calendar days. When the voters amended the Ordinance and created the immediate disclosure request process, the provision of the Act then in effect used 14 calendar days as the maximum time frame for extensions. That provision remains in effect. Gov't Code § 6253(c). Therefore, we read the Sunshine Ordinance and Public Records Act to allow an extension of up to 14 calendar days to respond to an immediate disclosure request.

If a department invokes the 14-day extension, it must notify the requester by the close of business on the business day following the request. Admin. Code § 67.25(b). A department may invoke the extension on one of the following grounds: (1) the voluminous nature of the records requested, (2) location of the records in a remote storage facility, and (3) the need to consult with another interested department. Admin. Code § 67.25(b). The Public Records Act further permits an extension to compile electronic data, write programming language or a computer program, or construct a computer report to extract data. Govt. Code § 6253(c)(4).

The purpose of the immediate disclosure request is to expedite the City's response to a simple, routine, or otherwise readily answerable request. For more extensive or demanding requests, the maximum deadlines for responding to a request apply. Admin. Code § 67.25(a). Thus, the requester's designation of a request as an immediate disclosure request does not automatically make it so. Rather, a department may adhere to the time deadlines governing standard requests – an initial 10-day period for response, plus a possible extension of up to 14 additional days – if the extensive or demanding nature of the request would impose an undue burden on the department to respond immediately.

c. Description requests: 7 calendar days

As noted earlier, the Sunshine Ordinance allows a member of the public to obtain a description of the existence, quantity, form, and nature of a department's records on a subject. Such a request is technically not a public records request, though it may easily be confused with one, especially when the description request accompanies a public records request. Departments must respond to description requests within 7 days. The Ordinance does not authorize time extensions for responding to such requests. Admin. Code § 67.21(c).

d. Calculating time

If a department receives a public records request after business hours or on a weekend or holiday, it may consider the next business day as the date of receipt. Civ. Code § 10. If a deadline for a response falls on a weekend or holiday, the department may consider the next business day as the deadline for response. Civ. Code § 11.

e. Duty to produce records incrementally

Departments must produce records as soon as reasonably possible on an incremental or "rolling" basis, when so requested. Therefore, even when a department has additional time to respond and is collecting a large quantity of records, if requested, it must produce records as it locates and reviews them rather than waiting until it has located and reviewed all potentially responsive records. Admin. Code § 67.25(d). This rule may not apply when, because of the relationship between two records (or sets of records), review of the first is not complete until the department has completed review of the second. If the department must redact a responsive record, review of the record is not complete until the department has made the redaction.

f. The rule of reason

In very rare circumstances a public records request or series of requests may become so burdensome, persistent or sweeping that it unreasonably impinges on a department's ability to perform its public duties. In these unusual instances, the department may be able to invoke a "rule of reason" (a common law doctrine occasionally cited in case law) to allocate the amount of time and resources a department devotes to responding. Departments believing that circumstances may warrant invoking this rule are urged to consult with the City Attorney's Office before doing so.

In general, the timing of a department's response must be reasonable in light of all the circumstances, including: the volume of records to be inspected; whether the records are readily available; the need, if any, to assign staff to oversee the inspection; whether the department is actively using the records; and the number of other public records requests to which the department is also responding. Without denying or unreasonably delaying the requested inspection, a department may consider significant disruption of its operations that inspection will cause in determining the timing and logistics of the inspection. In response to a request to inspect a large number of records, the department may afford the requester access to records for a specified amount of time each day if under the circumstances that procedure is reasonable.

Similarly, when responding to a request for copies of excessively voluminous records, a rule of reason may govern the timing of the response. Where compliance with a request may pose serious or insurmountable staffing burdens, the department may allocate a limited number of hours per day or week to work on responding to the request, to minimize disruption of its other public duties. In such circumstances, department personnel should endeavor to work cooperatively with the requester to determine if the request can be narrowed to minimize barriers to a prompt response, or to at least prioritize records the request would like to first retrieve and review first. If the same person makes multiple requests of a department or of the City as a whole, circumstances may likewise warrant allocating a limited number of hours per day or week to the individual's requests.

Because open government laws place such paramount importance on responding promptly to public records requests, a department should never lightly or routinely invoke the rule of reason as a basis for elongating the time for fully responding. Indeed, we strongly advise City personnel against invoking the rule of reason unless they have first consulted with the City Attorney's Office about their particular circumstances.

4. Proper response

a. The duty to respond

Departments may not refuse to respond to a public records request. In some circumstances, failure to respond could subject an employee to discipline. In addition, it could lead to a legal action in which the requester could recover attorneys' fees against the City.

Yet sometimes for various good faith reasons departments miss deadlines for responding to public records requests. Once a department realizes it has missed or will miss a deadline, it should expeditiously contact the requester and process the request as quickly as possible.

b. Types of responses

Following a reasonable search for responsive records, the department must do one of the following: disclose the records; inform the requester in writing that it has no records responsive to the request; or inform the requester in writing that responsive records exist, but that they are exempt from disclosure, stating the legal basis for the exemption. Govt. Code §§ 6253(c), 6255(b); Admin. Code §§ 67.21(b), 67.27. A record may be partially exempt from disclosure, in which case the department will redact the relevant portion of the record and must inform the requester in writing of the legal basis for the redaction. Admin. Code § 67.26.

c. No privilege log required

The law does not require a responding department withholding records to create a privilege log identifying the withheld records. It is common to prepare a privilege log in a litigation context, but not when responding to a public records request.

d. Information in electronic form

As a general rule, if a department has no records responsive to a request, the law does not require it to create or re-create one. But the Sunshine Ordinance requires the City to make information stored in electronic form available to a member of the public in any form requested so long as the information is available to or easily generated by the department in that form, including disk, tape, print-out, or on a computer monitor. Admin. Code § 67.21(l). Members of the public do not have a right to inspect public information on a computer monitor where the information visible on the monitor is inextricably intertwined with information that is properly exempt from disclosure. Admin. Code § 67.21(l). But departments must produce in an appropriate form the publicly disclosable information. With limited exceptions, the Sunshine Ordinance does not require a department to program or reprogram a computer to produce an electronic record. Admin. Code § 67.21(l).

But the Legislature has amended the Public Records Act to impose additional requirements about information that is in an electronic format. Govt. Code § 6253.9. A department must make the information available in any electronic format in which it holds the information. Govt. Code § 6253.9(a)(1). And it must make a copy of an electronic record available in the format requested if it has used that format to create copies for its own use or for other agencies. Govt. Code § 6253.9(a)(2). These provisions do not require a department to reconstruct a record in an electronic format if the record is no longer available electronically. Govt. Code § 6253.9(c).

i. Portable Document Format, or PDF

To facilitate accessibility and ease of use, many City departments provide their electronic records to the public as PDF files. PDF, which stands for "Portable Document Format," is a file format created by Adobe Systems in the early 1990s to facilitate the exchange electronic documents across multiple operating systems, and without requiring the purchase of specific software or hardware. PDF is now an open standard, meaning it is available without charge, is non-proprietary, and can be accommodated by different software. The advantages of providing records in this format are that:

- PDF is a free, open format
- PDF records are viewable and printable on any computer platform
- PDF records typically look like the original records and thus preserve the integrity of the original information
- PDF records can enable full-text searches to locate words and terms features in PDF documents that are saved in electronic format
- PDF records work with assistive technologies to make the information available to persons with disabilities

ii. Metadata

Sometimes a requester seeks a record in its original electronic format, which likely involves proprietary software, such as Microsoft Word or Excel. In such instances, it is usually the case that the electronic document will contain embedded, hidden information known as

"metadata." Metadata may include information about the document's authors and editors; comments shared among co-authors and editors; and tracked changes in versions of the document before its completion. This metadata may not be readily apparent in the final document, but it may nonetheless be fully available to the recipient were the document provided in its native file format. Depending on the nature of the record requested, some or all of the metadata it contains may be properly exempt from disclosure. In still other instances—including comments that may contain legal advice, medical, personnel or otherwise private information—the disclosure of metadata may actually be prohibited by law.

While current case law offers little guidance on legal questions relating to public disclosure of metadata, and while technologies continue to evolve quickly, there is no evidence that the California Legislature intended to require public entities to search and redact metadata in electronic records. Neither is there an apparent legislative intent to require government agencies to produce records in their electronic formats if their release would jeopardize or compromise the security or integrity of the original records, or of any proprietary software in which it is maintained. Govt. Code § 6253.9(f).

At the same time, the usability of public information provided to requesters is something that department personnel should consider in responding to public records requests. In asking for a public record in a native file format like Microsoft Excel, for example, a requester may simply be seeking a format that will enable searching, querying and summarizing public information in a manner that is far easier than if the record were provided in a scanned PDF or on a printed page. In some instances, the very same technology innovations that can present difficult public records questions may help resolve these issues through conversion to file formats that both meet the requester's needs and avoid problems with unauthorized disclosure of metadata. Departments seeking further advice on these issues should consult with their department's information technology staff and with the City Attorney's Office.

The San Francisco Board of Supervisors has adopted a policy directing its clerk to provide responsive records in the original format when the requester so requests. Other departments may wish to consider their own policy options in light of the risks of unintended or impermissible disclosure of metadata in documents specific to their own department's function. Again, departmental personnel seeking further advice on the topic of providing electronic records to members of the public should consult with their information technology staff and the City Attorney's Office.

iii. Fee for duplicating electronic records

The fee for duplicating electronic records is limited to the direct cost of producing copies in an electronic format. Govt. Code § 6253.9(a)(2). The Public Records Act amendment regarding electronic records imposed additional duties on local governments, beyond those that the Sunshine Ordinance imposes on the City, that may be charged to the requester. The requester pays the additional cost of producing a copy of the record, including the cost of constructing the record and of programming and computer services necessary to produce a copy, if (1) the department is required to produce a copy but the record is ordinarily produced only at otherwise regularly scheduled intervals, or (2) the request would require data compilation, extraction, or programming to produce the record. Govt. Code § 6253.9(b).

iv. Back-up files

As a general rule, departments need not search their back-up electronic files in response to a public records request. Back-up tapes serve the limited purpose of providing a means of recovery in cases of disaster, departmental system failure, or unauthorized deletion. They are not available for departmental use except in these limited situations. Electronic records such as e-mails that an employee has properly deleted under the department's records retention and destruction policy but that remain on back-up tapes are analogous to paper records that the department has lawfully discarded but may be found in a City-owned dumpster. Neither the Public Records Act nor the Sunshine Ordinance requires the City to search the trash for such records, whether paper or electronic.

v. Information on personal communications devices

Neither the Public Records Act nor the Sunshine Ordinance directly addresses whether communications sent or received on personal electronic devices such as cell phones and personal computers are subject to disclosure as public records. Courts have not definitively resolved this issue. Out of an abundance of caution, City officers and employees should assume that records pertaining to City business on their personal electronic devices may be public records subject to disclosure. In some circumstances, courts might have difficulty concluding that such electronic records are not public records.

Even if the Public Records Act covers records on personal communications devices, this does not mean that officers and employees must retain such communications. Personal electronic devices may have limited storage capacity, and communications on them, if deemed to be public records, would be subject to the department's records retention policy. See Section III below. These policies do not require retention of all public records, but only certain types of records as specified in State and local law. Examples of public records that the law does not require the City to retain include but are not limited to routine messages or e-mails, miscellaneous correspondence not requiring follow-up, notes, and preliminary drafts that have been superseded. For a more thorough understanding of records retention requirements, City officers and employees should consult their department's record retention policy and this Guide's discussion of records retention issues.

5. Fees

a. No fees for records search

Departments may not charge a fee for the time and costs incurred in searching for, locating, or collecting records to respond to a public records request. Govt. Code § 6253(b); Admin. Code § 67.26.

b. No fees for redacting exempt information

Departments may not charge a fee for the time and costs incurred in redacting exempt information from a record to be disclosed in response to a public records request. Govt. Code § 6253(b); Admin. Code § 67.26.

c. No fees for inspecting records

Departments may not charge a fee for a requester to inspect records. Admin. Code § 67.28(a). In some circumstances, a department may deploy staff to sit with requesters while they inspect records, to ensure the security of the records. The department may not charge a fee for this use of staff time. If the department has to make a new copy of a record for the requester to inspect because redactions have been made in the original, the department may not charge a fee for that inspection copy.

d. Fees for copies

Departments may charge a fee for the duplication and mailing of copies of records. Govt. Code § 6253(b). Departments may require payment before providing the copies. For records routinely produced in multiple copies for distribution, such as copies of an agenda reproduced for a meeting, a department may charge 1¢ per page, plus postage. Admin. Code § 67.28(b). For records assembled and copied to the order of the requester, a department may charge no more than 10¢ per page. Admin. Code § 67.28(c). A record that a department originally reproduced in multiple copies, but now must again reproduce in response to a public records request, such as the agenda for a past meeting of a policy body, is subject to the higher charge. A department may establish higher copying fees only if it prepares and posts an itemized cost analysis establishing that the per page direct cost exceeds the above amounts. Admin. Code § 67.28(d).

Where the requester seeks a copy of a record on a medium other than paper, the City may charge for the cost of the medium on which the information is duplicated. Admin. Code § 67.21(f). A department may charge up to $10 for video copies of video recorded meetings. Admin. Code § 67.28(e). There is no specific dollar limit on the charge for audio copies of audio recorded meetings, but, as with video copies or any other non-paper medium, the charge may not exceed the cost of the medium on which the information is duplicated.

e. Fees for other services

Departments may charge for services other than duplicating, such as providing certified copies of documents. We recommend consulting the City Attorney's Office if questions arise regarding possible conflicts between fees that the Sunshine Ordinance authorizes and those that State law or other ordinances authorize.

G. Exemptions from disclosure

The Public Records Act exempts certain classes of records from disclosure. The Sunshine Ordinance limits the City's ability to claim some of these exemptions. Interpreting these exemptions may present complex legal and factual questions that require consultation with the City Attorney's Office.

Both the Public Records Act and the Sunshine Ordinance create a general right of public access to public records. Therefore, the law always imposes the burden on the City to justify its refusal to disclose a record by specifying the legal basis. Govt. Code § 6255(b); Admin. Code §§ 67.27(a)-(c).

Some records contain both exempt and non-exempt information. A department may not withhold an entire record unless all the information in it is exempt. Admin. Code § 67.26. The department must redact the exempted material and annotate the redacted text by referring to the provision of the Public Records Act, Sunshine Ordinance, or other law authorizing the refusal to disclose. Admin. Code § 67.26. As previously noted, the department may not charge the requester a fee for redacting the information. Admin. Code § 67.26.

Some grounds for nondisclosure commonly arise. Below we discuss some of these. We do not discuss all the exemptions available under State and federal law; many apply only to specialized types of records and some rarely apply. Some exemptions stem from the Public Records Act itself. The Act also catalogues alphabetically many exemptions derived from other State laws, but this list is not exhaustive. Govt. Code §§ 6276.02-6276.48, 6275.

The exempt status of a record generally means that a department may but need not decline to disclose it. In other instances, such as where State or federal constitutional privacy interests of individuals or a statutory ban is involved, the department must not disclose a record even if it wishes to do so. Departments that have questions about whether they must invoke an exemption, or may choose not to, should consult the City Attorney's Office.

If a department voluntarily discloses a record that it may withhold, it waives its privilege to withhold the record in the future. Govt. Code § 6254.5. Departments may not disclose a record to one member of the public and withhold that record from another member of the public. But certain types of disclosures – for example, to another governmental entity, or if otherwise required by law – do not necessarily require disclosure of that same record to a member of the public. Govt. Code §§ 6254.5(b), (e). And if the department has inadvertently compromised a third party's rights by disclosing a record it should have withheld, it may not compound the error by making the same wrongful disclosure to another member of the public.

Individual employees generally lack the authority to waive a privilege to withhold a record. Depending on the circumstances, only the policy body that oversees the department, the department head, or other authorized personnel may make such a decision. Unauthorized disclosure of a privileged record is official misconduct and may subject the person who made the disclosure to disciplinary action or criminal prosecution, or both. Campaign & Govt. Conduct Code §§ 3.228, 3.242.

1. Exemption under state or federal law

The United States Constitution, the California Constitution, and federal or State statutes and regulations exempt or prohibit disclosure of certain records. The Public Records Act

incorporates these laws in an exemption. Govt. Code § 6254(k). Under this exemption, where disclosure would violate a federal or State law, the City may not release the record. Where federal or State law does not prohibit disclosure of a record but authorizes nondisclosure, the City may decide whether to disclose.

2. Privacy

Both state and local law recognize as a general principle that the right to personal privacy sometimes precludes disclosure of public records or information contained in those records. Govt. Code §§ 6250, 6254(c); Cal. Const., Art. I, §1; Admin. Code §67.1(g); Admin. Code Chapter 12M. These authorities may protect private information or records from disclosure even absent a statutory or constitutional provision addressing the specific information or type of record in question.

Some laws ban disclosure of information based on the privacy interests of individuals. For example, Welfare and Institutions Code § 10850 makes confidential records that concern individuals who receive certain public social services. In other circumstances, the bar to disclosure, while not absolute, is still high. In these cases, departments must determine whether disclosure serves a sufficiently significant public purpose to warrant release of the record and the attendant compromise of an individual's privacy. The level of the bar will depend on the strength of the privacy interest. Where the privacy interest is relatively weak, a weaker justification for disclosure in the public interest may suffice.

a. Privacy interests of city employees and officials

Departments must not disclose "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Govt. Code § 6254(c). But all personnel records are not automatically exempt. As a general rule:

- Members of the public are entitled to see records that contain a City employee's name, current or past job classification, current or past job assignment, and actual wages earned including overtime. Admin. Code §§ 67.24(c)(3), (4). There may be narrow exceptions to this general rule; for example, in limited circumstances some of this information for certain peace officers possibly may be withheld for safety or security reasons.
    - The City must disclose the amount, basis, and recipient of any performance-based increase in compensation or benefits or any other bonus that it awards to any employee. Admin. Code § 67.24(c)(6).
    - The City must disclose the job pool characteristics and employment and education histories of all job applicants who accepted employment with the City. Admin. Code §§ 67.24(c)(1), (2).

But, because of the right to privacy, as a general rule the City may not disclose personal information about employees such as home address, telephone numbers, personal e-mail address, age, date of birth, race or ethnicity, sex, and marital status. Disclosure of an employee's social security number is strictly prohibited. Govt. Code § 6254.29. Further, certain types of personnel records generally may not be disclosed. For example:

- The law generally considers a supervisor's performance evaluation of an employee a private matter that is not subject to disclosure.
- Generally the City must not disclose records containing medical or disability information about employees. Federal and state statutes provide broad protection for such information.
- Peace officer personnel records receive special protection under State law. Pen. Code §§ 832.7, 832.8.

Records concerning discipline of specific City employees, or circumstances that might warrant their discipline, often pose difficult issues. To the extent permitted by law, the Sunshine Ordinance requires the City to disclose records of an employee's confirmed misconduct involving personal dishonesty, misappropriation of public funds, resources, or benefits, unlawful discrimination, abuse of authority, or violence. Admin. Code § 67.24(c)(7). Whether the employee's misconduct is confirmed, and whether it is the type of misconduct addressed by the Ordinance, is sometimes unclear. The Ordinance does not directly address the treatment of unresolved or uninvestigated complaints against employees; complaints resolved in the employee's favor; or records of ongoing personnel investigations. We recommend that departments faced with requests for such records consult the City Attorney's Office. The privacy issues pertaining to these types of personnel records can be complex, and other considerations in addition to privacy, such as the need to maintain effective investigations, may be relevant.

The law protects the privacy of City officials as well as City employees. For example, the City should not, without a commissioner's consent, disclose that commissioner's personal e-mail address, even if the commissioner has disclosed it to commission staff. But departments should make available a City e-mail address at which members of the public may contact City officials, including commissioners. As another example, the Public Records Act strictly prohibits posting on the Internet the home address or phone number of any elected or appointed official, defined broadly to include not merely the Mayor and members of the Board of Supervisors but many others, including active and retired peace officers. Govt. Code §§ 6254.21, 6254.24.

b. Privacy interests of members of the public

The statutory and constitutional protections for privacy apply to information in City records about members of the public. To take the most obvious example, a patient in a City hospital or health clinic has medical privacy rights that the public records laws cannot override. Similarly, departments may not disclose medical information pertaining to a disability that an individual submits to the City in connection with a request for access to a City building or modification of a City program, unless the individual consents to the disclosure.

Concerns about identity theft warrant redaction of driver's license numbers, credit card numbers, checking account numbers, and similar information in records of transactions between the City and members of the public. In some circumstances, the law affords greater privacy protection for financial information about private individuals in City records than for comparable information about City employees; but the general rule is that

records of distribution of City funds to private persons, like salary payments to City employees, are subject to disclosure.

Although the comparison is not always exact, usually the types of personal information about employees and officials that the City may not disclose will parallel the personal information about members of the public that the City may not disclose. For example, the general rule is that departments should not disclose home addresses, personal phone numbers, or personal e-mail addresses of members of the public. Such personal contact information typically sheds no light on the operations of City government.

But there may be some circumstances in which knowing the location of a person's home is relevant to the public's ability to monitor the operations of government, for example, because of the proximity of the home to a site that is the subject of a City decision. And there may be circumstances where people do not have a reasonable expectation of privacy in contact information they have provided to the City, for example, based on notices on a department's forms or website. If a department is inclined to disclose contact information for private individuals or other information about members of the public of a personal nature, we recommend that the department consult the City Attorney's Office.

3. Pending litigation

A department may decline to disclose records relating to and developed during pending litigation to which the City is a party, until the litigation is finally adjudicated or otherwise settled. Govt. Code § 6254(b). But the City must disclose claims filed against it. Admin. Code § 67.24(b)(1)(i). Departments receiving requests for records relating to pending litigation should immediately contact the Deputy City Attorney handling the litigation.

4. Attorney-client communication

A department may decline to disclose any privileged communication between the department and its attorneys. State law makes communications between the City Attorney's Office and City officials and employees privileged and confidential. Govt. Code §§ 6254(k), 6276.04; Evidence Code §§ 950 et seq.

The Sunshine Ordinance requires disclosure of advice memoranda regarding the California Public Records Act, the Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or the Sunshine Ordinance. Admin. Code § 67.24(b)(1)(iii). At the same time the Charter and State law create attorney-client relationships between the City Attorney and City officials. Charter § 6.102. There may be instances where public disclosure of an attorney-client communication may conflict with the Charter and State law. We recommend that departments that receive requests for attorney-client communications consult with the City Attorney's Office.

The attorney-client privilege belongs to the client, not the attorney. Thus, records in the City Attorney's possession covered by the privilege must remain confidential unless the client – the City – consents to their disclosure. Bus. & Prof. Code § 6068(e). By the same token, with the City's authorization a department may disclose records in its possession

covered by the privilege. We recommend that departments consult with the City Attorney's Office before releasing records of privileged attorney-client communications.

5. Attorney work product

Records that contain the work product of an attorney representing the City are protected from disclosure. Govt. Code §§ 6254(k), 6276.04; Code Civ. Proc. §2018.030. The attorney work product doctrine functions as a privilege, protecting from disclosure "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Code Civ. Proc.§ 2018.030(a). This privilege may also extend to other records relating to the legal work of attorneys representing the City, including documents prepared at the request of attorneys, such as reports by investigators, consultants, and other experts.

The attorney work product privilege is distinct from the attorney-client privilege and can cover records that the attorney-client privilege does not. And, unlike the pending litigation exception, the attorney work product privilege extends beyond records prepared for litigation purposes. Where the privilege applies to litigation records, it does not lose its force at the conclusion of litigation.

6. Informants, complainants, and whistleblowers

In some circumstances, departments may shield from disclosure the identity of persons complaining to the City about violations of law. Evidence Code § 1041. Privacy or other grounds may also authorize or require nondisclosure, even where the complaint does not allege a violation of law. Govt. Code § 6254(c). Substantial public interests warrant withholding the identity of complainants. When, for example, a tenant complains about a landlord, a neighbor about a neighbor, an employee about an employer, or a citizen about a person making a public disturbance, disclosure of the identity of the complainant, the complaint, and/or the investigation could lead to retaliation against or harassment of the complainant and could also compromise the investigation. Under those circumstances the City may be able to withhold or redact the complaint and record of the investigation. See generally Evidence Code § 1040.

In addition, the City may protect from disclosure the identity of whistleblowers complaining about City officers' and employees' wasteful, inefficient, or improper use of City funds or other improper activities, as well as the content and investigation of those complaints. Charter §§ C3.699-13(a), P3.107(c); Campaign & Govt. Conduct Code §§ 4.120, 4.123. Central to the effectiveness of the City's whistleblower program is the public's understanding that the City will treat whistleblower complaints in a confidential manner to the extent permitted by law.

Finally, the constitutional right to petition the government for a redress of grievances, or to engage in anonymous protest speech, may in some circumstances protect the identity of complainants.

7. Trade secrets

Under certain circumstances, the law protects trade secrets from disclosure. Govt. Code § 6276.44; Civil Code §§ 3426, 3426.7(c); Evidence Code § 1060. Different types of information, including proprietary financial data, may constitute a trade secret. Several provisions in the Public Records Act address narrow categories of trade secrets or other proprietary information. See, e.g., Govt. Code §§ 6254.2 (pesticide safety and efficacy information), 6254.7 (certain air pollution data), 6254.15 (corporate financial information regarding location, expansion, and retention of corporate facilities in California).

But trade secret issues more likely will arise in a variety of business, contractual, and land use contexts not specifically addressed in the Public Records Act. A request for records that a company deems to be trade secrets can pose difficulties for the City, which must evaluate rather than take at face value the company's claim that the records are bona fide trade secrets. A department facing a records request that may contain trade secrets should consult the City Attorney's Office.

8. Investigative and security records

The Public Records Act exempts from disclosure records of complaints to, investigations conducted by, intelligence information or security procedures of, and investigatory or security files compiled by, local police agencies. Govt. Code § 6254(f). The City must disclose certain information in files covered by this exemption, but not the files themselves. This exemption also covers investigatory or security files compiled by non-police agencies for correctional, law enforcement, or licensing purposes.

The "law enforcement" feature of this exemption generally precludes its application to records of civil or administrative investigations conducted to determine compliance with ordinances. But the exemption for investigatory files that the City compiles for licensing purposes has broad reach given the range of permitting decisions that departments and policy bodies make. A separate exemption covers personal financial data that an applicant submits to qualify for a permit or license. Govt. Code § 6254(n).

For more information on security matters generally, see the memorandum entitled, "Guidelines for Redacting Information from Plans Created by the City to Anticipate and Respond to Emergencies Created by Terrorist or Other Criminal Activity" (September 15, 2006) on the City Attorney's website.

9. Other exemptions

The Public Records Act creates many other exemptions for specific types of records. Among these are records containing testing information pertaining to applications for public employment, Govt. Code § 6254(g); real estate appraisals, Govt. Code § 6254(h); library circulation records, Govt. Code § 6254(i); and records containing utility customer data, Govt. Code § 6254.16. There are many more, often narrow in scope and obscure.

Sometimes departments have legitimate programmatic or policy concerns with disclosing a record, but are not aware of an applicable exemption. In these circumstances, consultation

with the City Attorney's Office is appropriate. Given the emphasis on disclosure in our public records laws, there may be no applicable exemption. But in some cases there may be an exemption that is available to address the department's concerns.

H. Contracts and related records

The Sunshine Ordinance sets forth detailed rules governing disclosure of contracts and related materials. The City must disclose such records at least to the extent required by State law, but in certain respects the Ordinance affords the public greater access to these records than does State law. We summarize below the general disclosure rules applicable to contracts and related materials, and then discuss special rules that apply to sole source service contracts, certain leases and permits, and franchise agreements. Given the variety and in some cases complexity of City contracts, questions may arise that we do not answer below. For those, we recommend that departments consult the City Attorney's Office.

1. General rules

a. Mandatory post-award disclosure

Except as noted below, contracts, contractors' bids, responses to requests for proposals ("RFPs"), and all other records of communications between departments and persons or firms seeking contracts must be available for public inspection immediately after the City awards the contract. Admin. Code § 67.24(e)(1). When a department receives proposals in response to an RFP, but does not award a contract, it is not required to make the proposals public.

Though not specifically mentioned in the Sunshine Ordinance, responses to requests for information ("RFIs") and requests for qualifications ("RFQs") are subject to the same general rules for disclosure. Because responses to RFIs and RFQs typically precede the issuance of an RFP, questions may arise concerning the timing of disclosure of those responses and other records relating to the responses. Where such questions arise, we recommend that departments consult the City Attorney's Office.

b. Notice of disclosure requirements

The Sunshine Ordinance requires departments to inform bidders, proposers, and contractors that contract-related information they provide to the City will be subject to public disclosure on request, including, as discussed below, financial information the successful bidder or proposer submitted. Admin. Code § 67.24(e)(1).

c. Financial data

Departments may refuse to disclose proprietary financial information in records regarding an unsuccessful bidder or proposer including information on net worth. Admin. Code § 67.24(e)(1). Departments may withhold proprietary financial data about the winning bidder or proposer until the final approval authority in the City awards the contract. Admin. Code § 67.24(e)(1). Departments must make such information public upon award of the contract, unless other State or federal law prohibits such disclosure.

Admin. Code § 67.24(e)(1). In some instances (for example, under the federal Transportation Regulations for Disadvantaged Business Enterprises), State or federal law may forbid the City from disclosing the personal net worth and related records of successful bidders or proposers.

d. Records relating to negotiation strategy

As a general rule, departments may withhold from disclosure preliminary drafts, memoranda, notes, and other records containing recommendations relating to the City's negotiating strategy, that the City has not provided to a prospective contractor or other third party. See generally Admin. Code §§ 67.24(a)(1), 67.24(e)(1), 67.24(e)(3). Disclosure of such records to the public would mean that the party or parties with whom the City is negotiating may also obtain copies. The Sunshine Ordinance does not mandate such disclosures.

e. Score sheets and other evaluation materials for proposals

The Sunshine Ordinance mandates disclosure of certain records relating to RFPs. After completion of any review, evaluation, or rating of responses to an RFP, the City must make available for public inspection the names of scorers and evaluators, with their individual ratings, comments, and score sheets, and other materials used in the evaluation process. Admin. Code § 67.24(e)(1). The proposals that the panelists evaluate are not "other materials used in the evaluation process" and need not be disclosed at this stage in the contracting process. Proceedings of RFP selection panels are closed to the public.

f. Draft contracts

Departments may refuse to disclose draft versions of contracts during the negotiating process. But they must preserve these drafts and make them available for public inspection 10 days before presentation of the agreement to the policy body responsible for approving the agreement. Admin. Code § 67.24(a)(2). The 10-day rule does not apply where the policy body finds and articulates how the public interest would be unavoidably and substantially harmed by compliance with that rule. Admin. Code § 67.24(a)(2). Further, in the case of negotiations for a contract, lease, or other business agreement in which a City agency is offering to provide facilities or services in direct competition with other public or private entities that are not required to or do not make their competing proposals public, the policy body may postpone public access to the final draft agreement until the City agency presents the draft to it for approval. Admin. Code § 67.24(a)(2).

g. Other exemptions

Departments are not required to disclose contract-related records that federal or State law protect from disclosure or that fall within specific exemptions under the Public Records Act and Sunshine Ordinance. For example, privileged attorney-client communications, even if contract-related, are not subject to disclosure.

2. Sole source service contracts, certain leases and permits, and franchise agreements

Special rules govern disclosure of records exchanged between the City and another party during negotiation of the following types of contracts:

- Contracts for personal, professional, or other contractual services – if not subject to a competitive process, or where such process has arrived at a stage where there is only one qualified responsive bidder.
- Leases or permits – having total anticipated revenue or expense to the City of $500,000 or more, or for a term of 10 years or more.
- Franchise agreements.

For these types of contracts, departments must make available to the public upon request documents exchanged during negotiations relating to the positions of the parties, including drafts or portions of drafts of agreements. If the City does not prepare a record of the negotiations, or the record does not provide a meaningful representation of the positions of the parties, the Deputy City Attorney or other City representative familiar with the negotiations, upon written request from a member of the public, must prepare a written summary of the respective positions of the parties in the negotiations. The summary must be prepared within five business days of the final day of negotiations for the week. Admin. Code § 67.24(e)(3).

I. Enhanced access to public records under the Sunshine Ordinance

The Sunshine Ordinance limits the ability of City departments to invoke certain exemptions available under the Public Records Act and requires disclosure of certain types of records. We discuss below major features of the Ordinance that provide enhanced access to public records and that are not discussed elsewhere in this Guide.

1. General balancing prohibited

In addition to enumerating specific exemptions, the Public Records Act includes a general "public interest" balancing exemption. This exemption allows the government agency to refuse to disclose records where, on the facts of the particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Govt. Code § 6255(a). The Sunshine Ordinance prohibits the City from withholding or redacting records under this balancing exemption. Admin. Code § 67.24(g).

2. Deliberative process privilege unavailable

Under the general public interest balancing exemption of the Public Records Act, an agency may decline to disclose records based on the "deliberative process privilege." This privilege applies where the agency can demonstrate that disclosure of records would

discourage candid discussion in the agency, undermining its decisionmaking process and its ability to perform its functions. The Sunshine Ordinance prohibits the City from withholding or redacting records based on this privilege. Admin. Code § 67.24(h).

3. Budget and financial records are public

The Sunshine Ordinance requires the City to disclose budgets, whether tentative, proposed, or adopted, for the City or any department, program, project, or other category. Admin. Code § 67.24(f). The City must disclose all bills, claims, invoices, vouchers, or other records of payment obligations, and records of actual disbursements, showing amount paid, payee, and purpose of payment. But records of payments for social or other services that are confidential by law are exempt from disclosure. Admin. Code § 67.24(f).

4. Confidential litigation settlement provisions are prohibited

The Sunshine Ordinance prohibits the City from entering into confidential settlements of litigation. Admin Code § 67.12(b)(3).

J. Additional public information requirements

The Sunshine Ordinance and other provisions of City law enhance transparency in government by requiring departments to follow certain practices that facilitate the public's access to information. We highlight below the major provisions that this Guide does not discuss elsewhere.

1. Oral public information

Each department head must designate a knowledgeable person or persons who can answer questions regarding departmental operations, plans, policies, and positions. Admin. Code § 67.22(a). The department head may but is not required to serve in this capacity. Admin. Code § 67.22(a). The designated person must respond to inquiries, provided that no more than 15 minutes is required to obtain the information responsive to the inquiry. Admin. Code § 67.22(c). Whether by designating an alternate or multiple employees for this task, the department head should assure that someone is always available to provide oral information to the public.

Both the U.S. and California Constitutions explicitly provide for the right of the people to petition their government for redress of grievances, and practitioners of good government should make every effort to be accountable and responsive to the citizens they serve. But neither these constitutional guarantees nor the Sunshine Ordinance assure members of the public the right to interview, debate, or engage in lengthy discussions the employees or officials of their choosing. At the same time, none of these laws curtails informal informational discussions between employees and members of the public, if such contacts are acceptable to the employee and the department, not disruptive of departmental

operations, and do not violate other laws, such as those governing public meetings. Admin. Code § 67.22(b).

2. Public review file

The Clerk of the Board of Supervisors and the clerk or secretary of each board and commission enumerated in the Charter must maintain a public review file open for public inspection during normal business hours. Admin. Code § 67.23(a). This requirement does not apply to other policy bodies. The public review file must contain copies of communications that the clerk or secretary has distributed to or received from a quorum of the body concerning any matter on its meeting agendas within the previous 30 days or likely to be on a meeting agenda of the body within the next 30 days. Admin. Code § 67.23(a). This requirement does not apply to exempt materials, commercial solicitations, or periodical publications. Admin. Code § 67.23(a).

The clerk or secretary must maintain the public review file in chronological order for communications sent or received in the immediately preceding three business days. Admin. Code § 67.23(b). After a document has been on file for two days, it may be removed and placed in the monthly chronological file. Admin. Code § 67.23(b). The clerk or secretary need not put lengthy, multi-page reports attached to these communications in the chronological file if the file contains a letter or memorandum of transmittal referencing the report. Admin. Code § 67.23(c).

3. Annual reports

City boards, commissions, and departments must prepare an annual report. Charter § 4.103; Admin. Code § 2A.30. The annual report should contain a summary of the services and programs of the board, commission, or department, presented in terms and format accessible to the average citizen, and may include highlights and achievements of the prior year. Admin. Code § 1.56(a).

Boards, commissions, and departments that produce an annual report must post it on the City's website and transmit the Uniform Resources Locator (URL) to the Public Library within 10 days of final approval of the report. Admin. Code § 1.56(b); see also Admin. Code § 8.16. Where the law does not set the date for submitting the report, the board, commission, or department must notify the clerk of the Board of Supervisors in writing of the date by which the report will be posted. Admin. Code § 1.56(c).

City departments may not use City funds to print the annual report, absent prior approval by the Board of Supervisors. Admin. Code §1.56(d). City officials or employees may print the report from the website or maintain hard copies of the report pursuant to a records retention policy. Admin. Code § 1.56(d). At the request of a member of the public, the board, commission, or department, or the Library, must promptly print or assist in arranging the printing of the report from the website. Admin. Code § 1.56(d).

4. Annual lists of sole source contracts

At the end of each fiscal year, departments must provide to the Board of Supervisors a list of all sole source contracts entered into during that fiscal year. Admin. Code § 67.24(e)(3). The list is a public record available for inspection and copying.

5. Department head calendars

The Mayor, City Attorney, and department heads must keep and maintain a daily calendar. Admin. Code § 67.29-5. The calendar must record the time and place of each meeting or event the official attended, excluding purely personal or social events at which no City business is discussed that did not take place at City offices or the offices or residences of people who do substantial business with the City or are substantially financially affected by City actions. For meetings not otherwise publicly recorded, the calendar must include a general statement of the issues discussed. The Sunshine Ordinance does not require the official to include on the calendar the names of individuals attending the meeting.

Calendars must be available to any requester three business days after the calendar entry date. Admin. Code § 67.29-5. The calendar entry date is not when the meeting or event was physically entered into the calendar, but rather is the date of the meeting or event. The official need not disclose calendars in advance of the calendar entry date.

6. Maintaining a website

Departments must maintain a publicly accessible website. Admin. Code § 67.29-2. Each department must post on its website the following information for all of its policy bodies (including but not limited to all boards and commissions, whether or not Charter-created, committees of policy bodies, and advisory bodies):

- Notices and agendas for meetings of policy bodies, posted no later than the time at which this information is otherwise distributed to the public, allowing reasonable time for posting.
- Minutes of meetings within 48 hours after they have been approved. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- All notices, agendas, and minutes of meetings of policy bodies for the previous three years. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- Information that the policy body or department is required to make publicly available.

Each department must make reasonable efforts to review its website regularly and update it at least weekly. Admin. Code § 67.29-2. The Sunshine Ordinance encourages departments to make available on their respective websites as much information and as many documents as possible concerning their activities. Admin. Code § 67.29-2.

In addition, the City must post on the City's website (or comparable accessible location on the Internet) a current copy of the Charter and all City codes. Admin. Code § 67.29-2.

III. Records retention and destruction laws

Various local, state, and federal laws govern the retention and destruction of records. We summarize the most important requirements below. Department heads should familiarize themselves with the records retention requirements in Chapter 8 of the San Francisco Administrative Code and in the Sunshine Ordinance, as well as with rules relating to particular departmental records.

The purpose of the records classification and retention laws is to preserve important records for an appropriate period of time in an orderly fashion. Retention ensures that the public has access to important City records and that the legal and financial rights of the City and its residents are protected. In addition, a carefully considered retention policy obviates the need of a department to retain unnecessary records and incur unnecessary storage costs. Accordingly, each department must develop a written policy specifically outlining which records it must maintain, and for how long.

A. 'Records' defined

For the purpose of records retention law, the term "records" is defined much more narrowly than in the Public Records Act. In the retention context, "records" means any paper, book, photograph, film, sound recording, map, drawing, or other document, or any copy, made or received by the department in connection with the transaction of public business and retained by the department (1) as evidence of the department's activities, (2) for the information contained in it, or (3) to protect the legal or financial rights of the City or of persons directly affected by the activities of the City. Admin. Code § 8.1.

E-mail and other electronic records are potentially subject to the records retention laws. As with paper records, some electronic records fit the definition of "records" in the retention context. But most do not.

The vast majority of public records in the City's possession do not fall under the definition of "records" within the meaning of records retention law. Therefore, the City may destroy these records at any time. For example, as a general rule, employees may immediately dispose of phone message slips, notes of meetings, research notes prepared for the personal use of the employee creating them, and the large majority of e-mail communications.

In addition, departments may destroy at any time periodicals or publications they receive that are not of historical significance. They likewise may destroy duplicate copies even of documents the original copy of which the responsible City department must retain under records retention law. Govt. Code § 34090.7. With the exception of certain draft agreements, departments generally need not retain drafts of documents that later drafts or a final version supersede.

B. Classification of records

All records that are subject to records retention requirements fall into three classifications – Current, Storage, and Permanent – as described below.

- Current Records: Records that the department retains in its office space and equipment for convenience, ready reference, or other reason.
- Storage Records: Records that the department need not retain in its office space and equipment but that the department must, or should, prudently preserve for a time or permanently in the facilities of a records center.
- Permanent Records: Records that the department must permanently retain.

Admin. Code § 8.4. The department head is responsible for determining which types of departmental records properly fall under each of these classifications. Admin. Code § 8.3.

Departments must also designate certain records as "Essential Records" – essential to the continuity of government and the protection of rights and interests of individuals in case of possible destruction by a major disaster, such as fire, earthquake, flood, enemy attack, or other cause. Admin. Code § 8.9.

C. Retention and destruction of records

1. The records retention schedule

State law sets a floor for records retention. The general rule is that departments must maintain all records subject to records retention requirements for at least two years. Govt. Code § 34090. Again we emphasize that this requirement applies only to the minority of records in the possession of most City departments that are subject to any retention requirements. There are certain exceptions to the two-year State law standard, requiring records to be maintained for a longer period or permitting their destruction in a shorter period.

Consistent with State law, City law sets the following schedule for how long records must be retained.

Current records and storage records—more than two but less than five years old. Departments may destroy or otherwise dispose of these records if (1) their destruction will not be detrimental to the City or defeat any public purpose, and (2) a records retention schedule includes a definitive description of such records and sets forth the retention period applicable to them. The department head must prepare the schedule. The Mayor or Mayor's designee, or the board or commission that oversees the department, must approve the schedule. Further, the City Attorney must approve the schedule as to records of legal significance, the Controller must approve it as to financial records, and the Retirement Board must approve it as to time rolls, time cards, payroll checks, and related matters. Admin. Code § 8.3.

Current records and storage records—over five years old. Departments may destroy these records if they have served their purpose and are no longer required for any public

business or other public purpose. But departments may destroy financial records only after the Controller's approval; legally significant records only after the City Attorney's approval; and payroll checks, time cards, and related documents only after the Retirement Board's approval. Departments must deliver payroll checks, time cards, and related documents to the Retirement Board upon its request instead of destroying them. Admin. Code § 8.3.

Permanent records and essential records. Departments may not destroy or otherwise dispose of these records, except as stated here. Admin. Code § 8.3. Unless otherwise required by law or regulation, the City must store permanent records by microfilming the paper records or placing them on an optical imaging storage system, placing the original film or tape in a State-approved storage vault, and maintaining a copy with the department. Admin. Code § 8.4. The department, at its discretion, may then destroy the paper records.

2. Other principles pertaining to retention of records

Even if a document does not meet the definition of "record" for retention purposes, if the department receives a public records request for the document, it may not destroy it. The legal obligation to respond to public records requests and provide responsive records unless there is a legal basis for withholding them precludes the department from destroying the document after receiving the request.

The same principles apply if a document meets the definition of "record" for retention purposes but due to the passage of time could have been destroyed under the applicable records retention schedule. If the document is in the department's possession at the time of the public records request, the legal obligation to respond to the public records request trumps the discretion the department otherwise would have to destroy the document.

If a department elects to or must retain a particular e-mail, it must create and retain a hard copy in the appropriate file. In the alternative, a department with a reliable computer data storage and retrieval system may elect to store the document on that system. Departments may not rely on e-mail back up tapes to comply with City and State record retention laws.

D. Sunshine Ordinance provisions

The Sunshine Ordinance addresses certain records retention issues, as discussed below.

1. The general duty to maintain and preserve records

The Mayor and all department heads must maintain and preserve all documents and correspondence in a professional and businesslike manner. Admin. Code § 67.29-7(a). This does not mean that a department must retain all its records. Rather, institution of and compliance with the department's records retention policy satisfies this provision.

2. Designation of certain officials' records as city property that remains with the city

Documents that the Mayor's Office, elected officials, or department heads prepare, receive, or maintain are the City's property. The City must maintain the originals of such records consistent with record retention policies, even after the official leaves the office. Admin. Code § 67.29-1.

3. Duty to cooperate with City Administrator in compiling city index

The Sunshine Ordinance requires the City Administrator to compile an index that identifies the types of information and documents the City's departments, agencies, boards, commissions, and elected officials maintain. The index is for the use of City officials, staff, and the public. It should be organized to permit a general understanding of the types of information the City maintains, by which officials and departments, for which purposes, for what periods of retention, and under what manner of organization for accessing.

The City Administrator must continuously and accurately maintain the index. Each department, commission, and public official must cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity, those documents it receives in the ordinary course of business, and the types of requests that it regularly receives. Each department, agency, commission, or public official shall report any changes in practices or procedures affecting the accuracy of the index. Admin. Code § 67.29.

4. Specific retention requirements

The Sunshine Ordinance requires retention of certain specific records. For example:

- Departments must retain for public review, before approval by a policy body, drafts of agreements City representatives are negotiating with another party that have been exchanged with that party. Admin. Code § 67.24(a)(2).
- Policy bodies must permanently retain tapes of their meetings, regardless of whether the body was required to tape the meeting. Admin. Code §§ 67.14(b), 67.8-1(a).
- The Department of Elections must preserve all records and invoices relating to the design and printing of ballots and other election materials, as well as records documenting who had custody of ballots from the time ballots are cast until they are received and certified by the department. Admin. Code § 67.29-7(b).
- Charter boards and commissions must retain for at least 30 days written materials that must be included in the public review file. Admin. Code § 67.23.

Some of these retention requirements are discussed in greater detail elsewhere in this Guide.

LexisNexis®

COUNTY OF LOS ANGELES, Plaintiff and Appellant, v. LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION, Defendant and Respondent; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Real Party in Interest and Respondent.

S191944

SUPREME COURT OF CALIFORNIA

56 Cal. 4th 905; 301 P.3d 1102; 157 Cal. Rptr. 3d 481; 2013 Cal. LEXIS 4692; 195 L.R.R.M. 2933; 163 Lab. Cas. (CCH) P62,357

May 30, 2013, Filed

SUBSEQUENT HISTORY: Reported at *County of Los Angeles v. Los Angeles County Employee Relations Com., 2013 Cal. LEXIS 5959 (Cal., May 30, 2013)*

PRIOR HISTORY:
Superior Court of Los Angeles County, No. BS116593, James C. Chalfant, Judge. Court of Appeal, Second Appellate District, Division Three, No. B217658.
County of Los Angeles v. Los Angeles County Employee Relations Com., 192 Cal. App. 4th 1409, 122 Cal. Rptr. 3d 464, 2011 Cal. App. LEXIS 209 (Cal. App. 2d Dist., 2011)

LexisNexis(R) Headnotes

Governments > Legislation > Interpretation
Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Jurisdiction
(HN1) In giving the Public Employment Relations Board (PERB) jurisdiction over disputes arising under the Meyers-Milias-Brown Act (MMBA), *Gov. Code, § 3500 et seq.*, the Legislature made an express exception for the Los Angeles County Employee Relations Commission (EROCM). *Gov. Code, § 3509, subd. (a)*, states that, notwithstanding PERB's jurisdiction to administer the MMBA, EROCM retains the power to consider and resolve employment relations matters consistent with and pursuant to the policies of this chapter. Allegations of unfair labor practices by Los Angeles County must be brought to EROCM, not PERB. In essence, EROCM is a separate agency empowered to resolve public employment labor disputes in Los Angeles County just as PERB does for all other counties in California. EROCM must exercise its authority in a manner consistent with and pursuant to the policies of the MMBA as interpreted and administered by PERB. Accordingly, the county's ordinance must be construed to avoid any conflict with the MMBA, and decisions from PERB interpreting the MMBA are highly persuasive when interpreting the county's ordinance. Federal administrative decisions interpreting analogous provisions of the National Labor Relations Act are also persuasive authority.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
(HN2) Decisions under the National Labor Relations Act and corresponding California laws have long held that employers must generally give unions the home addresses and telephone numbers of employees the union represents. These holdings stem from the general principle that an employer's duty to bargain in good faith

encompasses an obligation to provide information the union needs in order to represent employees. The United States Supreme Court has observed that there can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Some information is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant. Presumptively relevant information must be disclosed unless the employer proves a lack of relevance or gives adequate reasons why the information cannot be supplied. Moreover, in appropriate cases, a union's ability to obtain relevant information may be tempered by measures to accommodate privacy concerns. Upon a clear showing of need for confidentiality, courts have found less than complete disclosure justified.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation
[HN3] A union elected as an exclusive bargaining agent owes a duty of fair representation to all employees in the bargaining unit. Accordingly, state and federal decisions have consistently held that the employer's obligation to provide relevant information extends to information about employees who are not union members. The National Labor Relations Board has held that employees' home addresses and phone numbers are presumptively relevant to the union's role as bargaining agent.

Constitutional Law > Substantive Due Process > Privacy > Personal Information
Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation
[HN4] Public Employment Relations Board (PERB) decisions have held that employee contact information is presumptively relevant under California's labor statutes and that refusal to disclosure upon a representative union's request based on such a request threatens to violate a constitutionally protected privacy interest. PERB decisions have followed the National Labor Relations Board in applying a balancing test. Once the union has established the relevance and need for certain information, the burden is on the employer to prove that disclosure would compromise the right of privacy. If the employer carries this burden, the court balances the conflicting interests of confidentiality and discovery. However, if the employer fails to show that disclosure would violate a protected privacy interest, no balancing is necessary and the court will simply order the information disclosed. A union is entitled to obtain all information necessary and relevant to representing employees in collective bargaining.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
[HN5] *Gov. Code, § 3505*, requires public employers to meet and confer in good faith with union representatives regarding wages, hours, and other terms and conditions of employment. The statute states that the duty to meet and confer includes a duty to negotiate to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Refusals to Bargain
[HN6] The meet and confer duty requires parties to exchange freely information and to endeavor to reach agreement on matters within the scope of representation. *Gov. Code, § 3505*. The phrase "matters within the scope of representation" describes the subjects on which the parties must seek agreement. It does not modify, or limit, the information that must be freely exchanged. One aspect of the duty to bargain collectively in good faith with labor organizations requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information. Doing so serves the underlying policy of the Meyers-Milias-Brown Act, *Gov. Code, § 3500 et seq.*, of fostering informed collective bargaining. Accordingly, appellate courts have held that an employer's failure to provide such information constitutes a refusal to bargain in good faith.

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview
[HN7] *Gov. Code, § 3507*, lists several subjects on which a public employer may adopt rules to govern employment relations. Among these topics, the statute allows employers to adopt a rule for furnishing nonconfidential

information pertaining to employment relations to employee organizations. *§ 3507, subd. (a)(8).*

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize
[HN8] *Gov. Code, § 3507*, is not the source of the duty to disclose. Rather, a public employer's disclosure obligation arises from *Gov. Code, § 3503*, concerning unions' right to represent employees, and *Gov. Code, § 3505*, concerning employers' obligation to bargain in good faith.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
[HN9] See L.A. County Code, § 5.04.060, subd. A.

Governments > State & Territorial Governments > Relations With Governments
Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview
[HN10] Local rules cannot conflict with the Meyers-Milias-Brown Act (MMBA), *Gov. Code, § 3500 et seq.* The MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes. Local regulation is permitted only if consistent with the purposes of the MMBA.

Constitutional Law > Substantive Due Process > Privacy > General Overview
[HN11] See *Cal. Const., art. I, § 1*.

Constitutional Law > Substantive Due Process > Privacy > General Overview
Torts > Intentional Torts > Invasion of Privacy > General Overview
[HN12] An actionable constitutional invasion of privacy claim requires three essential elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests. In general, a court should not proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three required elements. A defendant can also prevail at the balancing stage. An otherwise actionable invasion of privacy may be legally justified if it substantively furthers one or more legitimate competing interests. Conversely, the invasion may be unjustified if the claimant can point to feasible and effective alternatives with a lesser impact on privacy interests.

Constitutional Law > Substantive Due Process > Privacy > General Overview
Torts > Intentional Torts > Invasion of Privacy > General Overview
[HN13] In applying the balancing test for a constitutional invasion of privacy claim, trial courts necessarily have broad discretion to weigh and balance the competing interests.

Constitutional Law > Substantive Due Process > Privacy > Personal Information
[HN14] Legally recognized privacy interests include interests in precluding the dissemination or misuse of sensitive and confidential information, which have been described under the umbrella term "informational privacy." Individuals have a substantial interest in the privacy of their home. In particular, the privacy interest in avoiding unwanted communication is stronger in the context of an individual's home than in a more public setting. Accordingly, home contact information is generally considered private.

Constitutional Law > Substantive Due Process > Privacy > General Overview
[HN15] A reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. The reasonableness of a privacy expectation depends on the surrounding context. Customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.

Constitutional Law > Substantive Due Process > Privacy > Personal Information
[HN16] A job applicant who provides personal information to a prospective employer can reasonably

expect that the employer will not divulge the information outside the entity except in very limited circumstances. For example, various laws require employers to disclose information to governmental agencies, such as the Internal Revenue Service and Social Security Administration, and disclosure may also be necessary for banks or insurance companies to provide employee benefits. But beyond these required disclosures, it is reasonable for employees to expect that their home contact information will remain private in light of employers' usual confidentiality customs and practices.

Constitutional Law > Substantive Due Process > Privacy > General Overview
Torts > Intentional Torts > Invasion of Privacy > General Overview
[HN17] Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.

Constitutional Law > Substantive Due Process > Privacy > General Overview
[HN18] Invasion of a privacy interest is not a violation of California's state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation
Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Breach of Duty of Fair Representation
[HN19] A union breaches the duty of representation if it fails to inform employees about the status of negotiations or changes in the contractual terms of their employment. Because the union's duty extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees on these important topics. In addition, a union must give nonmembers an opportunity to express their views on bargaining matters, even if these employees do not have a vote. Direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Finally, every year the union must send Hudson notices to all employees explaining how their dues are used. The obligation to send Hudson notices falls on the union, not the employer, and a union commits an unfair business practice if it collects an agency fee without providing a proper notice.

Administrative Law > Judicial Review > Remedies > General Overview
[HN20] *Code Civ. Proc., § 1094.5, subd. (f)*, expressly limits the remedies a court may order when reviewing administrative orders and decisions. The court can deny the writ or grant it and set aside the decision. If it sets aside the decision, the court can order the agency to take further action, but it cannot limit or control in any way the discretion legally vested in the agency.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a county's petition for administrative mandate challenging a hearing officer's order that the county disclose nonmember employees' contact information to a union. The union requested contact information for employees in bargaining units covered by agency shop provisions. The county objected that disclosure of contact information would violate nonmembers' privacy rights. (Superior Court of Los Angeles County, No. BS116993, James C. Chalfant, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B217668, ruled that the union could obtain contact information only for nonmember employees who failed to object.

The Supreme Court reversed the decision of the Court of Appeal and remanded for entry of judgment denying the county's petition for writ of mandate. The court held that the contact information was presumptively relevant to the union's duty of fair representation; thus, the county's duty to bargain in good faith (*Gov. Code, § 3505*) encompassed an obligation to provide the information. The county's disclosure obligation, which also arose in part from *Gov. Code, § 3503*, was not limited by *Gov. Code, § 3507, subd. (a)(8)*. Although nonmember employees had a privacy interest (*Cal. Const., art. I, § 1*) in maintaining the privacy of their home addresses and telephone numbers, a balancing of

interests favored disclosure of the information because direct communication between the union and the employees was essential to keep the employees informed and to ensure that their opinions were heard. The court of appeal overstepped its authority (*Code Civ. Proc., § 1094.5, subd. (f)*) by ordering specific notice and opt-out procedures, which interfered with agency discretion. (Opinion by Corrigan, J., expressing the unanimous view of the court.) [*906]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Labor § 37--Collective Bargaining--Jurisdiction--Meyers-Milias-Brown Act--Los Angeles County Employee Relations Commission.--In giving the Public Employment Relations Board (PERB) jurisdiction over disputes arising under the Meyers-Milias-Brown Act (MMBA) (*Gov. Code, § 3500 et seq.*), the Legislature made an express exception for the Los Angeles County Employee Relations Commission (ERCOM). *Gov. Code, § 3509, subd. (d)*, states that, notwithstanding PERB's jurisdiction to administer the MMBA, ERCOM retains the power to consider and resolve employment relations matters consistent with and pursuant to the policies of this chapter. Allegations of unfair labor practices by Los Angeles County must be brought to ERCOM, not PERB. In essence, ERCOM is a separate agency empowered to resolve public employment labor disputes in Los Angeles County just as PERB does for all other counties in California. ERCOM must exercise its authority in a manner consistent with and pursuant to the policies of the MMBA as interpreted and administered by PERB. Accordingly, the county's ordinance must be construed to avoid any conflict with the MMBA, and decisions from PERB interpreting the MMBA are highly persuasive when interpreting the county's ordinance. Federal administrative decisions interpreting analogous provisions of the National Labor Relations Act are also persuasive authority.

(2) Labor § 37--Collective Bargaining--Duty to Bargain--Disclosing Employee Contact Information to Union.--Decisions under the National Labor Relations Act and corresponding California laws have long held that employers must generally give unions the home addresses and telephone numbers of employees the union represents. These holdings stem from the general principle that an employer's duty to bargain in good faith encompasses an obligation to provide information the union needs in order to represent employees. The United States Supreme Court has observed that there can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Some information is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant. Presumptively relevant information must be disclosed unless the employer proves a lack of relevance or gives adequate reasons why the information cannot be supplied. Moreover, in appropriate cases, a union's ability to obtain relevant information may be tempered by measures to accommodate privacy concerns. Upon a clear showing of need for confidentiality, courts have found less than complete disclosure justified. [*907]

(3) Labor § 37--Collective Bargaining--Duty of Fair Representation--Employee Contact Information Presumptively Relevant.--A union elected as an exclusive bargaining agent owes a duty of fair representation to all employees in the bargaining unit. Accordingly, state and federal decisions have consistently held that the employer's obligation to provide relevant information extends to information about employees who are not union members. The National Labor Relations Board has held that employees' home addresses and phone numbers are presumptively relevant to the union's role as bargaining agent.

(4) Labor § 37--Collective Bargaining--Duty of Fair Representation--Employee Contact Information Presumptively Relevant.--Public Employment Relations Board (PERB) decisions have held that employee contact information is presumptively relevant under California's labor statutes and subject to disclosure upon a representative union's request. When such a request threatens to violate a constitutionally protected privacy interest, PERB decisions have followed the National Labor Relations Board in applying a balancing test. Once the union has established the relevance and need for certain information, the burden is on the employer to prove that disclosure would compromise the right of privacy. If the employer carries this burden, the court balances the conflicting interests of confidentiality and discovery. However, if the employer fails to show that disclosure would violate a protected privacy interest, no balancing is necessary and the court will simply order the

information disclosed. A union is entitled to obtain all information necessary and relevant to representing employees in collective bargaining.

(5) Labor § 37--Collective Bargaining--Duty to Bargain--Disclosing Employee Contact Information to Union.--The meet and confer duty requires parties to exchange freely information and to endeavor to reach agreement on matters within the scope of representation (*Gov. Code, § 3505*). The phrase "matters within the scope of representation" describes the subjects on which the parties must seek agreement. It does not modify, or limit, the information that must be freely exchanged. One aspect of the duty to bargain collectively in good faith with labor organizations requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information. Doing so serves the underlying policy of the Meyers-Milias-Brown Act (*Gov. Code, § 3500 et seq.*) of fostering informed collective bargaining. Accordingly, appellate courts have held that an employer's failure to provide such information constitutes a refusal to bargain in good faith.

(6) Labor § 37--Collective Bargaining--Duty to Bargain--Disclosing Employee Contact Information to Union.--*Gov. Code, § 3507*, is not the [*908] source of the duty to disclose. Rather, a public employer's disclosure obligation arises from *Gov. Code, § 3503*, concerning unions' right to represent employees, and *Gov. Code, § 3505*, concerning employers' obligation to bargain in good faith.

(7) Labor § 37--Collective Bargaining--Meyers-Milias-Brown Act--State Preemption of Contradictory Local Regulation.--Local rules cannot conflict with the Meyers-Milias-Brown Act (MMBA) (*Gov. Code, § 3500 et seq.*). The MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes. Local regulation is permitted only if consistent with the purposes of the MMBA.

(8) Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Elements and Balancing Test.--An actionable constitutional invasion of privacy claim requires three essential elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests. In general, a court should not proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three required elements. A defendant can also prevail at the balancing stage. An otherwise actionable invasion of privacy may be legally justified if it substantively furthers one or more legitimate competing interests. Conversely, the invasion may be unjustified if the claimant can point to feasible and effective alternatives with a lesser impact on privacy interests.

(9) Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Discretion in Applying Balancing Test.--In applying the balancing test for a constitutional invasion of privacy claim, trial courts necessarily have broad discretion to weigh and balance the competing interests.

(10) Privacy § 3--Nature and Extent of Right--Home Contact Information.--Legally recognized privacy interests include interests in precluding the dissemination or misuse of sensitive and confidential information, which have been described under the umbrella term "informational privacy." Individuals have a substantial interest in the privacy of their home. In particular, the privacy interest in avoiding unwanted communication is stronger in the context of an individual's home than in a more public setting. Accordingly, home contact information is generally considered private. [*909]

(11) Privacy § 3--Nature and Extent of Right--Reasonableness of Expectation.--A reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. The reasonableness of a privacy expectation depends on the surrounding context. Customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.

(12) Privacy § 3--Nature and Extent of Right--Home Contact Information--Disclosure by Employer.--A job applicant who provides personal information to a prospective employer can reasonably expect that the employer will not divulge the information outside the entity except in very limited circumstances. For example, various laws require employers to disclose information to governmental agencies, such as the Internal Revenue Service and Social Security Administration, and

disclosure may also be necessary for banks or insurance companies to provide employee benefits. But beyond these required disclosures, it is reasonable for employees to expect that their home contact information will remain private in light of employers' usual confidentiality customs and practices.

(13) Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Seriousness of Invasion.--Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.

(14) Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Application of Balancing Test.--Invasion of a privacy interest is not a violation of California's state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

(15) Labor § 37--Collective Bargaining--Duty of Fair Representation--Breached by Failure to Inform--Necessity for Direct Communication.--A union breaches the duty of representation if it fails to inform employees about the status of negotiations or changes in the contractual terms of their employment. Because the union's duty extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees on [*910] these important topics. In addition, a union must give nonmembers an opportunity to express their views on bargaining matters, even if these employees do not have a vote. Direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Finally, every year the union must send *Hudson* notices to all employees explaining how their dues are used. The obligation to send *Hudson* notices falls on the union, not the employer, and a union commits an unfair business practice if it collects an agency fee without providing a proper notice.

(16) Administrative Law § 99--Judicial Review and Relief--Methods--Administrative Mandamus--Remedies Limited.--*Code Civ. Proc., § 1094.5, subd. (f)*, expressly limits the remedies a court may order when reviewing administrative orders and decisions. The court can deny the writ or grant it and set aside the decision. If it sets aside the decision, the court can order the agency to take further action, but it cannot limit or control in any way the discretion legally vested in the agency.

(17) Labor § 37--Collective Bargaining--Duty of Fair Representation--Necessity for Direct Communication--Outweighing Privacy Interest in Contact Information.--Long-standing case law and public policy support direct communication between unions and the employees they represent. Thus, a union's interest in communicating with all county employees significantly outweighed nonmembers' interest in preserving the privacy of their contact information.

(Wilcox, Cal. Employment Law (2013) ch. 51, § 51.30; *Cal. Forms of Pleading and Practice (2013) ch. 429, Privacy, § 429.16.*)

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JUDGES: Opinion by Corrigan, J., expressing the unanimous view of the court.

OPINION BY: Corrigan

OPINION

[**1105] [***485] CORRIGAN, J.--This case involves the balance between an employee's right of informational privacy [1] and a union's right to obtain information it needs to represent the employee in collective bargaining. The Service Employees International Union, Local 721 (SEIU), is the exclusive bargaining representative of all Los Angeles County (County) employees. The question here is whether SEIU is entitled to obtain the home addresses and phone numbers of all represented employees, including those who have not joined the union. We agree with both courts below that it is so entitled but reverse the Court of Appeal's imposition of procedural requirements limiting disclosure.

1 See *Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal.4th 360, 372-373 [53 Cal. Rptr. 3d 513, 150 P.3d 198] (Pioneer Electronics)*.

State and federal labor decisions have long held that unions are presumptively entitled to contact information for all employees they represent. These decisions, and applicable labor laws, generally obligate the County to give SEIU the requested information. Whether the right to privacy under *article I, [*912] section 1 of the California Constitution* prohibits disclosure is a question of first impression. We conclude that, although the County's employees have a cognizable privacy interest in their home addresses and telephone numbers, the balance of interests strongly favors disclosure of this information to the union that represents them. Procedures may be developed for employees who object to this disclosure. However, the Court of Appeal exceeded its authority in this administrative mandate proceeding by attempting to impose specific procedures on the parties.

I. BACKGROUND

SEIU is the certified majority representative for County employees in several bargaining units. County employees have a collective right to unionize but an individual right to refuse to join or participate in a union. (*Gov. Code, § 3502*; [2] L.A. County Code, § 5.04.070.) To accommodate these rights, a public agency may enter into an "agency shop agreement" with the organization recognized as the employees' exclusive or majority bargaining agent. (*§ 3502.3, subd. (a).*) An "agency shop" is "an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee ... ." (*Ibid.*)

2 All statutory references are to the Government Code unless otherwise specified.

Each of the County's bargaining units has a memorandum of understanding (MOU) with SEIU. Most of these MOUs have no agency shop provision that gives County employees four options: (1) join SEIU and pay dues; (2) decline to join and pay a fair share [**1106] fee; (3) decline to join, object to the fair share fee, and instead pay an agency shop fee; or (4) decline to join, claim a religious exemption, and pay the agency shop fee to a nonreligious, nonlabor charitable fund. A recognized bargaining agent acts on behalf of *all* employees in a bargaining unit, whether the employees are union members or not.

Teachers v. Hudson (1986) 475 U.S. 292 [89 L. Ed. 2d 232, 106 S. Ct. 1066] (*Hudson*) requires that SEIU send County employees an annual notice to collect fees from nonmembers. The *Hudson* notice sets out membership options, applicable fees, and the reasons for these fees. [3] SEIU's notice [*913] [***486] packet also includes forms allowing the employee to join or decline

to join the union. Those who decline are asked to provide their names, home addresses, and home telephone numbers. Employees who do not return any form are, by default, considered "fair share fee payers." As of 2007, nearly 12,000 of the County's approximately 14,500 nonmember employees were fair share fee payers. SEIU has home addresses for about half of these nonmembers. [4]

3 In *Hudson*, the United States Supreme Court held that the *First Amendment* rights of nonunion employees require that, before an agency fee is collected, employees must receive "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*Hudson, supra, 475 U.S. at p. 310*; see *Knox v. Service Employees (2012) 567 U.S. ____, ____ [183 L. Ed. 2d 281, 132 S. Ct. 2277, 2292-2293]* [*Hudson* notice must also be provided when public sector union imposes a special assessment or dues increase].)

4 SEIU also has contact information for approximately 46,000 County employees who are members.

Historically, the County provided lists of nonmembers' names, worksites, office addresses, and supervisors, but has never given SEIU home addresses or telephone numbers. Consequently, SEIU has not sent *Hudson* notices directly to County employees. Instead, since at least 1994, SEIU has delivered *Hudson* notice packets to the Los Angeles County Employee Relations Commission (ERCOM), an independent body that manages relations between the County and its employees under the Meyers-Milias-Brown Act (MMBA). (*§§ 3507, 3509.*) [5] ERCOM would then mail the *Hudson* notices, using address labels provided by the County.

5 ERCOM performs the same function for Los Angeles County as the Public Employment Relations Board performs for other public employers in California. (See *post*, at p. ____.)

During negotiations in 2005, SEIU proposed amending the MOU as follows: "To facilitate the carrying out of this responsibility [to provide *Hudson* notices], each year the County shall furnish the Union with the names and home addresses of employees in [the] bargaining units covered by agency shop provisions." SEIU also sought contact information for other reasons. As the exclusive bargaining representative, SEIU wanted to communicate with all County employees, members or otherwise, about union activities and events. [6] It also wanted the information for recruitment [7] and investigation of grievances.

6 Some communication with nonmembers is possible through bulletin boards at County worksites.

7 A union representative testified: "If we had the chance to talk to [the nonmembers], we could have them as members."

The County rejected the amendment, contending contact information was not relevant to any collective bargaining issue and disclosure would violate nonmembers' privacy rights. The County proposed either to continue the current arrangement or to negotiate a procedure for employees to release their own data. SEIU opposed these alternatives, withdrew its proposal to modify the *Hudson* notice provision, and filed a charge with ERCOM alleging an unfair employee relations practice. [*914]

After a three-day hearing, an administrative hearing officer concluded the County's refusal to provide the contact information was an unfair labor practice. Relying on decisions by the Public Employment Relations Board (PERB) and the National Labor Relations Board (NLRB), the hearing officer [**1107] held the contact information was presumptively relevant (see *post*, at p. ____) to SEIU's representation. While acknowledging [***487] that privacy interests were at stake, the hearing officer found the County had not met its burden to show that the nonmembers' privacy interest outweighed SEIU's need for the information. ERCOM adopted the hearing officer's findings and ordered disclosure.

The County sought a writ of administrative mandate, urging that nonmembers had a constitutional privacy right that justified nondisclosure. [8] (*Code Civ. Proc., § 1094.5.*) Although the superior court concluded nonmember County employees had a legally protected privacy right and disclosure of their contact information constituted a "non-trivial" invasion of that right, it also held that SEIU needed the information to fulfill its duty to represent all County employees in collective bargaining. The court then balanced those competing interests. It observed that labor law precedents, while not

dispositive, establish a strong public policy in favor of union access to the information. On balance, the public policy favoring collective bargaining outweighed any privacy interest nonmember County employees might have in nondisclosure. Because disclosure did not violate California law, the court denied the County's petition for relief from ERCOM's order.

> 8 The trial court held the privacy claim had not been exhausted because the County had not relied on it at the administrative hearing. Nevertheless, the court considered the claim on its merits.

The County sought review, and the appellate court reframed the issue. It agreed with the trial court that nonmember employees had a reasonable expectation of privacy in their home addresses and phone numbers. However, the court did not balance this expectation of privacy against SEIU's need for the information. Instead, it characterized the question as whether a nonunion employee "has a reasonable expectation under California privacy laws that he or she will be provided notice and an opportunity to object before" contact information is disclosed to the union.

The court acknowledged the question it framed was one of first impression. It sought guidance by analogizing SEIU's request to a class action discovery request for consumers' personal information. Importing a procedure from class action litigation, the court held nonmember employees were entitled to notice and an opportunity to opt out before their home addresses and telephone numbers could be disclosed to SEIU. (See, e.g., *Pioneer Electronics, supra, 40 Cal.4th at pp. 372-373.*) In this analysis, the appellate court [*915] assumed the privacy rights of objecting employees would always outweigh SEIU's need for the information and that SEIU only had a right to contact information for those nonmember employees who failed to object. We granted SEIU's petition for review.

II. DISCUSSION

A. *Employee's Duty to Provide Information Relevant to Collective Bargaining*

As a threshold matter, apart from privacy concerns, the County contends no applicable law requires that it give SEIU the requested information. We hold to the contrary. Under the MMBA and applicable labor law precedents, the failure to provide relevant information violated the County's obligation to bargain in good faith. Before turning to the good faith question, we explore the interrelation between federal and state labor laws.

[***488] 1. *Overview of Applicable Labor Laws*

The *National Labor Relations Act* (NLRA; 29 U.S.C. § 151 et seq.) governs collective bargaining in private sector employment. (1 Castagnera et al., Termination of Employment (2000) § 1:131; see *Department of Defense v. FLRA (1994) 510 U.S. 487, 503 [127 L.Ed.2d 325, 114 S.Ct. 1006]* (*Dept. of Defense*); *Teledyne Economic Development v. N.L.R.B. (4th Cir. 1997) 108 F.3d 56, 59.*) However, the NLRA leaves states free to regulate labor relationships with their public employees. (*29 U.S.C. § 152(2)*; *Davenport v. Washington Ed. Assn. (2007) 551 U.S. 177, 181 [168 L.Ed.2 71, 127 S.Ct. 2372].*)

[**1108] Public employees in California do not have the right to bargain collectively absent enabling legislation. (*American Federation of State etc. Employees v. County of Los Angeles (1975) 49 Cal. App. 3d 356, 358 [122 Cal. Rptr. 591]* (*American Federation*).) Rather than fashion a single overarching employment relations law, like the NLRA, our Legislature has passed several different statutes covering specific categories of public employees. (See *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1084-1086 [29 Cal. Rptr. 3d 234, 112 P.3d 623]* (*Coachella Valley*).) In 1968, the Legislature enacted the MMBA, authorizing collective bargaining for employees of most local governments, including Los Angeles County. (*§ 3500 et seq.*, amended by Stats. 1968, ch. 1390, pp. 2725-2729.) State employees and those of school districts were excluded from the MMBA (*Coachella Valley, at p. 1083*), but separate statutes were later enacted to cover these government [*916] workers. [9] "The MMBA imposes on local public entities a duty to meet and confer in good faith with representatives of recognized employee organizations, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees. (*Gov. Code, § 3505.*)" (*Coachella Valley, at p. 1083.*)

> 9 Employment relations between the State of California and certain categories of its employees are governed by the Ralph C. Dills Act, (*§ 3512 et seq.*, amended by Stats. 1986, ch. 103, § 1, p. 237.) School district employment relations are covered by the Educational Employment Relations Act. (*§ 3540 et seq.*)

The MMBA is administered by PERB, a quasi-judicial administrative agency modeled after the NLRB. (See *Coachella Valley, supra, 35 Cal.4th at pp. 1084-1085*; *§ 3540.*) Although the Legislature initially created PERB in 1975 to enforce a different employment relations statute, [10] PERB's jurisdiction has expanded as the Legislature passed new laws addressing specific realms of public employment. (*Coachella Valley, at p. 1085.*) In 2000, the Legislature brought the MMBA within PERB's authority (*Coachella Valley, at p. 1085*; Stats. 2000, ch. 901, § 8, p. 6607 [adding *§ 3509*]), giving PERB exclusive initial jurisdiction over complaints alleging unfair labor practices violating the MMBA. (*§ 3509*; *City of San Jose v. Operating Engineers Local Union No. 3 (2010) 49 Cal.4th 597, 605* [***489] *[110 Cal. Rptr. 3d 718, 232 P.3d 701].*) However, the statute does not apply to Los Angeles County. (*§ 3509, subd. (d).*)

> 10 The Legislature created the Educational Employment Relations Board (EERB) in 1975 to administer the *Educational Employment Relations Act* (EERA). (*Coachella Valley, supra, 35 Cal.4th at pp. 1084-1085.*) In 1977 the Legislature expanded the EERB's jurisdiction to encompass unfair practice charges under the former State Employer-Employee Relations Act (*§ 3512 et seq.* [now the Ralph C. Dills Act]) and renamed the entity "Public Employment Relations Board." (*Coachella Valley, at p. 1083.*)

(1) In the same year the MMBA was enacted, the County passed its own ordinance conforming to the legislative policies expressed in the MMBA. (*American Federation, supra, 49 Cal. App. 3d at p. 358.*) The ordinance created ERCOM to administer its provisions. (*Ibid.*; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles (1973) 33 Cal. App. 3d 1, 3 [108 Cal. Rptr. 623]*.) [fN1] In giving PERB jurisdiction over MMBA disputes, the Legislature made an express exception for ERCOM. *Section 3509, subdivision (d)* states that, notwithstanding PERB's jurisdiction to administer the MMBA, ERCOM retains the power to consider and resolve employment relations matters "consistent with and pursuant to the policies of this chapter." Allegations of unfair labor practices by the County must be brought to ERCOM, not PERB. In essence, ERCOM is a separate agency empowered to resolve public employment labor disputes in Los Angeles County just as PERB does for all other counties in California. [*917]

ERCOM must exercise its authority in a manner "consistent with and pursuant to" the policies of the MMBA as interpreted and administered by PERB. (*§ 3509, subd. (d).*) Accordingly, the County's ordinance must be construed to avoid any conflict with [**1109] the MMBA, and decisions from PERB interpreting the MMBA are highly persuasive when interpreting the County's ordinance. As we discuss, PERB decisions have uniformly given unions the right to obtain employee home contact information. Federal administrative decisions interpreting analogous provisions of the NLRA are also persuasive authority supporting disclosure of the information sought here.

2. *Labor Law Precedents Hold Contact Information Presumptively Relevant*

[HN2] (2) Decisions under the NLRA and corresponding California laws have long held that employers must generally give unions the home addresses and telephone numbers of employees the union represents. These holdings stem from the general principle that an employer's duty to bargain in good faith encompasses an obligation to provide information the union needs in order to represent employees. The United States Supreme Court has observed, "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." (*NLRB v. Acme Industrial Co. (1967) 385 U.S. 432, 435-436 [17 L. Ed. 2d 495, 87 S. Ct. 565]*, citing *Labor Board v. Truitt Mfg. Co. (1956) 351 U.S. 149 [100 L. Ed. 1027, 76 S. Ct. 753].*)

Some information is so intrinsic to the core of the employer-employee relationship that it is considered " 'presumptively relevant.' " (*Pattern Breadcrusting Co. v. N.L.R.B. (9th Cir. 1999) 172 F.3d 660, 669*; see *San Diego Newspaper Guild, Local No. 95 v. NLRB (9th Cir. 1977) 548 F.2d 863, 867* (*San Diego Newspaper Guild*).) Presumptively relevant information must be disclosed unless the employer proves a lack of relevance or gives adequate reasons why the information cannot be supplied. (*San Diego Newspaper Guild, at p. 867*; *The Kroger Company (1976) 226 N.L.R.B. 312, 313-314.*) [11] Moreover, in appropriate [***490] cases, a union's

ability to obtain relevant information may be tempered by measures to accommodate privacy concerns. "Upon a clear showing of need for confidentiality, courts have found less than complete disclosure justified. [Citations.]" (*Press Democrat, supra, 629 F.3d at pp. 1336-1337*; see *Detroit Edison Co. v. NLRB (1979) 440 U.S. 301, 317-320 [59 L. Ed. 3d 333, 99 S. Ct. 1123]*.)

> 11 Conversely, when the information requested is not ordinarily pertinent to collective bargaining, the union has the burden of establishing relevance. (*Press Democrat Publishing Co. v. NLRB (9th Cir. 1980) 629 F.2d 1320, 1324* (*Press Democrat*); *San Diego Newspaper Guild, supra, 548 F.2d at pp. 867-868*.)

[*918]

[HN3] (3) A union elected as an exclusive bargaining agent owes a duty of fair representation to *all* employees in the bargaining unit. (See *Jones v. Dumbrowski (2004) 123 Cal.App.4th 273, 283 [20 Cal. Rptr. 3d 706]*; *Lane v. I.U.O.E. Stationary Engineers (1989) 213 Cal. App. 3d 164, 169 [260 Cal. Rptr. 634]*; see also *Vaca v. Sipes (1967) 386 U.S. 171, 177 [17 L. Ed. 2d 842, 87 S. Ct. 903]* [same rule under NLRA].) Accordingly, state and federal decisions have consistently held that the employer's obligation to provide relevant information extends to information about employees who are not union members.

a. NLRB Decisions

The NLRB has held that employees' home addresses and phone numbers are presumptively relevant to the union's role as bargaining agent. (*Norco Laboratories (1984) 271 N.L.R.B. 1397, 1398.*) An evolving line of cases establishing this point began in 1966, just two years before the MMBA was enacted. In *Excelsior Underwear, Inc. (1966) 156 N.L.R.B. 1236, 1239-1240*, the NLRB ruled that private employers must provide unions with the names and addresses of all employees before an election to resolve a bargaining representative. The NLRB reasoned that an employer can easily communicate with employees to oppose union representation, but labor organizers generally have limited access to worksites. Thus, without a list of employee names and addresses, labor unions cannot be certain of reaching all employees with arguments supporting representation. (*Id. at pp. 1240-1241.*) Although the union might have other means of communicating with some employees, these alternatives are not always adequate. The NLRB stressed [**1110] that "the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters. ... [B]y providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." (*Id. at p. 1241*, fn. omitted.) The United States Supreme Court later observed that the disclosure requirement established in *Excelsior Underwear* promotes the goal of fair elections "by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses." (*NLRB v. Wyman-Gordon Co. (1969) 394 U.S. 759, 767 [22 L. Ed. 2d 709, 89 S. Ct. 1426]*.)

Nearly 30 years ago, this court applied the *Excelsior Underwear* rule in the agricultural context. In *Cortiva v. Agricultural Labor Relations Bd. (1984) 36 Cal.3d 654 [205 Cal. Rptr. 657, 685 P.2d 701]*, we upheld a regulation requiring employers to provide a list of employee names, street addresses, and job classifications to a union seeking to organize agricultural employees. We noted that employers had long been required to furnish unions with lists of employee names and addresses under *Excelsior Underwear* and that facilitating communication between employees and union organizers aided the administration [***491] of union elections. (*Cortiva, at pp. 665-667.*) [*919]

The *Excelsior Underwear* decision was later extended beyond the election context. In *Prudential Ins. Co. of America v. N.L.R.B. (2d Cir. 1969) 412 F.2d 77, 81* (*Prudential*), the Second Circuit Court of Appeals held that an employer's duty of disclosure "applies with as much force to information needed by the Union for the effective administration of a collective bargaining agreement already in force as to information relevant in the negotiation of a new contract. ([Citations.])" As the exclusive bargaining agent for *all* employees, a union has a statutory duty to represent the interests of nonmembers. (*Humphrey v. Moore (1964) 375 U.S. 335, 342 [11 L. Ed. 2d 370, 84 S. Ct. 363]*.) The *Prudential* court reasoned, "It seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf [it] acts." (*Prudential, at p. 84.*) A union must be able to tell employees about negotiations and obtain their views on bargaining priorities. (*Ibid.*) "Further, in order to administer an existing agreement effectively, a union must be able to

appraise the employees of the benefits to which they are entitled under the contract and of its readiness to enforce compliance with the agreement for their protection." (*Ibid.*)

The *Prudential* court observed that other types of information, such as wage data, are considered presumptively relevant. (*Prudential, supra, 412 F.3d at p. 84.*) It went on to conclude that employee contact information "has as even more fundamental relevance" to the union's role. (*Ibid.*) The union needs contact information "to bargain intelligently on specific issues of concern to the employees. But data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expense of a union's relationship with the employees. In this instance it is urgent so that the exclusive bargaining representative of the employees may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests. Because this information is therefore so basically related to the proper performance of the union's statutory duties, ... any special showing of specific relevance would be superfluous." (*Ibid.*)

b. PERB Decisions

(4) As noted, NLRA cases are persuasive authority for interpreting similar provisions of state law, including the MMBA. (*Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 617 [116 Cal. Rptr. 507, 526 P.2d 971]*; see *Los Angeles County Civil Service Com. v. Superior Court (1978) 23 Cal.3d 55, 63-64 [151 Cal. Rptr. 547, 588 P.2d 249]* [relying on NLRB precedent in construing MMBA provision regarding layoffs].) Based on *Prudential* and similar cases decided under the NLRA, [HN4] PERB decisions have held that employee contact information is presumptively relevant under California's labor [**1111] statutes and subject to disclosure upon a representative's request. [*920]

When such a request threatens to violate a constitutionally protected privacy interest, PERB decisions have also followed the NLRB in applying a balancing test. (*Modesto City Schools & High School Dist.* (1985) PERB Dec. No. 479; *Los Rios Community College Dist.* (1988) PERB Dec. No. 670; see *Detroit Edison Co. v. NLRB, supra, 440 U.S. at pp. 317-320* [establishing the federal balancing test].) Once the union has established the relevance and need for certain information, the burden is on the employer to prove that disclosure would compromise the right of [***492] privacy. (*Modesto City Schools*, at p. 10.) If the employer carries this burden, the court balances the conflicting interests of confidentiality and discovery. (*Id.* at pp. 11-13.) However, if the employer fails to show that disclosure would violate a protected privacy interest, no balancing is necessary and the court will simply order the information disclosed. (*Id.* at p. 12.)

In *Stockton Unified School Dist.* (1980) PERB Dec. No. 143 (*Stockton*), a school district refused to provide information about health insurance benefits paid to union members. Relying on NLRB cases, PERB ruled that a union is entitled to obtain all information necessary and relevant to representing employees in collective bargaining. (*Id.* at p. 22.) Because the health insurance information was presumptively relevant, the district's failure to provide it constituted a refusal to bargain in good faith under the EERA. (*§ 3543.5*; see *Stockton*, at pp. 18-19.) [12] Two years later, PERB extended *Stockton* to a request for employee addresses. In *Mt. San Antonio Community College Dist.* (1982) PERB Dec. No. 224 (*Mt. San Antonio*), a union sought home addresses of certain instructors who no longer worked for a community college district but were potentially entitled to benefits under a recent decision of this court. (*Id.* at p. 11.) [13] The hearing officer concluded that the requested names and addresses were reasonably related to the union's representational duties. (*Mt. San Antonio*, at p. 11.) PERB agreed, and ordered disclosure. (*Id.* at p. 12.)

> 12 The EERA is one of several public employment statutes administered by PERB. (*Coachella Valley, supra, 35 Cal.4th at p. 1089.*) Like the MMBA (*§ 3505*), the EERA requires public school employers to "meet and negotiate in good faith" with their employees' exclusive bargaining representatives. (*§ 3543.5, subd. (c).*)
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> 13 *Perris Federation of Teachers v. Perris Community College Dist. (1979) 24 Cal.3d 369 [155 Cal. Rptr. 679, 595 P.2d 113]*.

After *Mt. San Antonio*, PERB decisions have squarely held that the names and addresses of public employees are presumptively relevant and subject to disclosure as part of the duty to bargain in good faith. In *Bakersfield City School Dist.* (1998) PERB Dec. No. 1262 (*Bakersfield*), a union representing school district employees wanted their home addresses and telephone numbers to send *Hudson* notices and communicate with

nonmembers about other collective bargaining issues. Alternate means of communication were not consistently reliable or confidential. (*Bakersfield*, at p. 15 [hearing officer's [*921] proposed order].) [14] Citing *Mt. San Antonio* and NLRB decisions, PERB concluded the employee contact information was presumptively relevant to collective bargaining and the district's failure to provide it violated the EERA, both as a refusal to bargain in good faith (*§ 3543.5, subd. (c)*) and as an interference with the unions' right to represent unit members (*§ 3543.5, subd. (b)*). (*Bakersfield*, at p. 22; see *San Bernardino City Unified School Dist.* (1998) PERB Dec. No. 1270 at pp. 75-79.)

14 PERB adopted the hearing officer's findings of fact and conclusions of law as the decision of the board itself. (*Bakersfield, supra*, PERB Dec. No. 1262 at p. 2.)

These principles also apply to claims arising under the MMBA. In *Golden Empire Transit Dist.* (2004) PERB Dec. No. 1704-M (*Golden Empire*), a bus drivers' union requested employees' home addresses and phone numbers. The transit district refused, citing confidentiality concerns. (*Id.* at p. 2.) Instead, the district sent a consent form to all employees allowing them to agree to disclosure. Contact information would only be released to the [***493] union if the employee gave express permission. (*Id.* at pp. 2-3.) PERB [**1112] concluded the district violated the MMBA (*§§ 3503, 3505, 3506*) by refusing to give the information "and by unilaterally changing the mechanics of providing such information" to the union. (*Golden Empire*, at p. 9.) Because a union's ability to communicate with those it represents is fundamental to its role in collective bargaining, employee contact information must be disclosed absent a compelling need for privacy. (*Golden Empire*, at p. 8.) The union's need for the information was strong. Its inability to communicate with employees in their homes had "severely hindered" the capacity to fulfill its obligations as their bargaining representative. (*Id.* at p. 7.) For example, the union could not advise employees of new union security requirements, dues increases, and workplace problems. (*Ibid.*) With home address and telephone information, the union could directly inform employees about union meetings and negotiations and quickly contact employees who were potential witnesses in grievance investigations. (*Ibid.*) The union could not adequately communicate through alternate means, such as bulletin board postings or personal meetings at the jobsite, because the employees were bus drivers who worked different shifts and were frequently on the road. (*Ibid.*) The employer did not show that the need for privacy outweighed these substantial interests.

While recognizing that PERB decisions "are due some deference," the County asserts they are not persuasive because they draw upon precedents decided under the NLRA. As explained, however, federal authorities are relevant and properly examined for guidance in interpreting similar provisions in our state's labor laws. The *Golden Empire* analysis provides persuasive guidance here. [**922]

Courts generally defer to PERB's construction of labor law provisions within its jurisdiction. (*See San Mateo City School Dist. v. Public Employment Relations Bd. (1983) 33 Cal.3d 850, 856 [191 Cal. Rptr. 800, 663 P.2d 523] [EERA]; Paulsen v. Local No. 856 of Internat. Brotherhood of Teamsters (2011) 193 Cal.App.4th 823, 830 [123 Cal. Rptr. 3d 332] [MMBA].*) "... PERB is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' [Citation.]" (*Banning Teachers Assn. v. Public Employment Relations Bd. (1988) 44 Cal.3d 799, 804 [244 Cal. Rptr. 671, 750 P.2d 313].*) We follow PERB's interpretation unless it is clearly erroneous. (*Ibid.*) Here, it is not. PERB's conclusion that the duty of good faith bargaining generally requires disclosure of employee contact information is consistent with the language and purpose of the MMBA, its own decisions interpreting it, and long-standing precedent under the NLRA. Nothing in the language or legislative history of the MMBA persuades us to upset this settled understanding.

3. The MMBA Requires Disclosure of Contact Information

The County makes several arguments to counter this analysis. None is availing. First, the County relies on two MMBA provisions to argue against disclosure.

[HN5] *Section 3505* requires public employers to "meet and confer in good faith (with union representatives) regarding wages, hours, and other terms and conditions of employment ... ." The statute states that the duty to meet and confer includes a duty to negotiate "to exchange freely information, opinions, and proposals,

and to endeavor to reach agreement on [***494] matters within the scope of representation ... ." (*§ 3505.*) The County asserts that the phrase "matters within the scope of representation" pertains only to the terms and conditions of employment and that employee addresses and phone numbers are not information that must be freely exchanged.

(5) Initially, the County's position is inconsistent with the language of the statute. [HN6] The meet and confer duty requires parties "to exchange freely information ... *and* to endeavor to reach agreement on matters within the scope of representation ... ." (*§ 3505*, italics added.) The phrase "matters within the scope of representation" describes the subjects on which the parties must seek [**1113] agreement. It does not modify, or limit, the information that must be freely exchanged.

Further, the County's narrow interpretation is not supported by precedent. It has long been held that "[o]ne aspect of the duty to bargain 'collectively in [*923] good faith with labor organizations' [citation] requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information. [Citation.]" (*Cardinal Distributing Co. v. Agricultural Labor Relations Bd. (1984) 159 Cal. App. 3d 758, 762 [205 Cal. Rptr. 860].*) Doing so serves the MMBA's underlying policy of fostering informed collective bargaining. Accordingly, appellate courts have held that an employer's failure to provide such information constitutes a refusal to bargain in good faith. (*Cardinal Distributing Co., at p. 762.*) The County argues the employee information at issue here is not relevant. Yet NLRB and PERB decisions undermine that assertion. (See, e.g., *Bakersfield, supra*, PERB Dec. No. 1262 at pp. 17-18.)

(6) The County next argues that another MMBA provision, *section 3307*, does not compel disclosure of employees' home addresses and phone numbers. [HN7] *Section 3507* lists several subjects on which a public employer may adopt rules to govern employment relations. Among these topics, the statute allows employers to adopt a rule for "[f]urnishing nonconfidential information pertaining to employment relations to employee organizations." (*§ 3507, subd. (a)(8).*) Relying on the statutory construction canon *expressio unius est exclusio alterius*, [15] the County argues that because a rule may be adopted for the furnishing of *nonconfidential* information, the Legislature must have intended to bar the disclosure of confidential information, including home addresses and telephone numbers. This assertion begs the next question we will address because it assumes the information is confidential. Moreover, PERB decisions interpreting the MMBA make it clear that [HN8] *section 3507* is not the source of the duty to disclose. Rather, a public employer's disclosure obligation arises from *sections 3503*, concerning unions' right to represent employees, and *3505*, concerning employers' obligation to bargain in good faith. (See *Golden Empire, supra*, PERB Dec. No. 1704-M at p. 19.)

15 This phrase means "[e]xpression of one thing is the exclusion of another." (Black's Law Dict. (4th rev. ed. 1968) p. 692, col. 1; see *Imperial Merchant Services, Inc. v. Hunt (2009) 47 Cal.4th 381, 389 [97 Cal. Rptr. 3d 464, 212 P.3d 736].*)

The County further contends the MMBA's legislative history shows that it was not intended to require the disclosure sought here. However, the County points to nothing in the legislative history that even mentions the issue. First, the County cites committee reports describing general opposition to codifying collective bargaining rules for public sector employees. But strong sentiments were also expressed [***495] in favor of collective bargaining (see, e.g., Assem. Interim Com. on Industrial Relations, Final Rep. on Assem. Bill No. 607 (1959 Reg. Sess.), and the MMBA was ultimately enacted. [16]

16 At the County's request, we have taken judicial notice of legislative materials for several bills, from 1959 through 1968, that the Legislature considered in enacting the MMBA. [*924]

Second, the County claims the legislative history demonstrates resistance to importing NLRA requirements into public sector collective bargaining. Specifically, one committee report observed that an amendment to the MMBA's "meet and confer" requirement was not intended to replicate the same procedure for collective bargaining in the private sector. (Assem. Com. on State Employment, Retirement, and Military Affairs, Summary of Major 1968 Legislation (1967 Reg. Sess.).) Whereas good faith under the NLRA requires "sincere attempts by both sides to reach agreement," the meet and confer provision of the MMBA was intended primarily to formalize and improve communications between the

bargaining parties. (Assem. Com. on State Employment, Retirement, and Military Affairs, Summary of Major 1968 Legislation, p. 4.) The County cites this discussion as evidence that the Legislature did not intend to import all collective bargaining practices under the NLRA into the state law governing public employment relations. We need not resolve that question. Even if the [**1114] County's interpretation is correct, it does not follow that the Legislature intended that California's courts and regulatory bodies ignore settled law under the NLRA when interpreting identical provisions in the MMBA. On the contrary, we have expressly approved of reference to the NLRA and cases interpreting it for guidance in construing our state's labor laws. (*Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d at p. 617.) Nor does it follow that the Legislature intended to exempt public employers from the obligation to disclose employee contact information when the statutory language and legislative history of the MMBA are completely silent on the point.

Notably, the Legislature has expressly approved the disclosure of contact information for some public employees. *Section 6254.3* creates an exception to the *California Public Records Act* (*§ 6250 et seq.*) for state, school district, and county office of education employees. Under this statute, employees' home addresses and telephone numbers are generally exempt from public inspection, except that the information may be disclosed to "an employee organization pursuant to regulations and decisions of the [PERB] ... ." (*§ 6254.3, subd. (a)(3).*) [17] Accordingly, although the contact information for state employees and certain county and local employees is generally to be kept private from the public at large, the Legislature has specifically authorized its disclosure to *unions* in accordance with PERB precedent. [18]

17 The statute makes an exception to this exception for law enforcement employees, whose home addresses and telephone numbers are not to be disclosed. (*§ 6254.3, subd. (a)(3).*)

18 A regulation implementing this provision requires that the state provide employee unions with the home addresses of all represented employees. (*Cal. Code Regs., tit. 8, § 40165.*) Amicus curiae California Department of Personnel Administration states that it has provided home addresses to various employee unions in accordance with section *6254.3* since 1984.

[*925]

In a related point, the County asserts its conduct was appropriate under a local ordinance. The ordinance states, in relevant part: [HN5] "To facilitate negotiations, the county [***496] shall provide to certified employee organizations concerned the published data it regularly has available concerning subjects under negotiation ... ." (L.A. County Code, § 5.04.060, subd. A.) The County contends it had no obligation to disclose addresses and phone numbers because they were not published and do not concern a subject under negotiation. However, the agency charged with enforcing the ordinance concluded otherwise. The ERCOM hearing officer observed that the agency had never *limited* the information to be disclosed to the material described in the ordinance. The ordinance simply describes a type of information the County must provide to the union; it does not purport to limit or prohibit additional disclosures.

(7) In any event, even if the County's interpretation of the ordinance were correct, it would have no effect because [HN10] local rules cannot conflict with the MMBA. "The MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes. [Citations.] Local regulation is permitted only if 'consistent with the purposes of the MMBA.' [Citation.]" (*International Federation of Prof. & Technical Engineers v. City and County of San Francisco (2000) 79 Cal.App.4th 1300, 1305 [94 Cal. Rptr. 2d 790].*) Thus, the ordinance could not absolve the County of its broader duty under the MMBA to provide the information requested by the union.

4. Conclusion

Consistent with PERB's long-standing interpretation of the MMBA and similar labor law provisions, SEIU's request for home addresses and phone numbers of the County employees it represented called for presumptively relevant information. The burden was therefore on the County to prove that the contact information was not relevant or to supply adequate reasons why the information could not be supplied. (*San Diego Newspaper Guild, supra, 548 P.2d at p. 867*; see *Modesto City Schools & High School Dist., supra*, PERB Dec. No. 479 at p. 10 [burden is on employer to show that disclosure would violate a right of privacy].) Because the County failed to do so, its refusal to provide the information [**1115] violated the duty to meet and confer in good faith. (*§ 3505*; see *Golden Empire, supra*, PERB Dec. No. 1704-M at pp. 6-8; *Bakersfield, supra*, PERB Dec. No. 1262 at p. 22.)

B. Disclosure Does Not Violate the Constitutional Right of Privacy

The foregoing analysis is based on settled labor law principles. Whether California's constitutional right of privacy requires a different resolution is a novel question. [*926]

In 1972, Californians, by initiative, added an explicit right to privacy in the state's Constitution: [HN11] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy.*" (*Cal. Const., art. I, § 1*, italics added.)

(8) In *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1 [26 Cal. Rptr. 2d 834, 865 P.2d 633] (Hill)*, this court established a framework for analyzing constitutional invasion of privacy claims. [HN12] An actionable claim requires three essential elements: (1) the claimant must possess a legally protected privacy interest (*id. at p. 35*); (2) the claimant's expectation of privacy must be objectively reasonable (*id. at pp. 36-37*); and (3) the invasion of privacy complained of must [***497] be serious in both its nature and scope (*id. at p. 37*). If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests. (*Id. at pp. 37-38.*) In general, the court should not proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three required elements. (*Id. at p. 40*; see *Pioneer Electronics, supra, 40 Cal.4th at p. 373.*) A defendant can also prevail at the balancing stage. An otherwise actionable invasion of privacy may be legally justified if it substantively furthers one or more legitimate competing interests. (*Hill, at p. 40.*) Conversely, the invasion may be unjustified if the claimant can point to "feasible and effective alternatives" with "a lesser impact on privacy interests." (*Ibid.*)

The question in *Hill* was whether *California Constitution, article I, section 1* supports a cause of action for invasion of privacy. Here, the question is somewhat different. The County claims it is obligated to assert employees' privacy rights and that this obligation relieves it of any duty to honor the union's requests. Nevertheless, *Hill* provides a useful framework for examining how competing interests are managed in the privacy context.

[HN13] (9) "[I]n applying the *Hill* balancing test, trial courts necessarily have broad discretion to weigh and balance the competing interests. (*Hill, supra, 7 Cal.4th at pp. 37-38.*)" (*Pioneer Electronics, supra, 40 Cal.4th at p. 371.*) The trial court here found that County employees who are not union members have a substantial interest in maintaining the privacy of their home addresses and telephone numbers. The court gave this interest additional weight because the employees had exercised their constitutional right *not* to associate with the union. However, on balance, the court concluded SEIU's interest in contacting the employees it represents "significantly outweighs" nonmembers' interest in preventing disclosure of the information. After examining each of the *Hill* factors, we agree with the trial court that disclosure was required. [*927]

1. Legally Protected Privacy Interest

[HN14] (10) Legally recognized privacy interests include "interests in precluding the dissemination or misuse of sensitive and confidential information," which *Hill* described under the umbrella term " 'informational privacy.' " (*Hill, supra, 7 Cal.4th at p. 35.*) The parties agree that County employees have a legally protected privacy interest in their home addresses and telephone numbers. "Courts have frequently recognized that individuals have a substantial interest in the privacy of their home. [Citations.]" (*Planned Parenthood* [**1116] *Golden Gate v. Superior Court (2000) 83 Cal.App.4th 347, 359 [99 Cal. Rptr. 2d 627].*) In particular, the "privacy interest in avoiding unwanted communication" is stronger in the context of *no* individual's home than in a more public setting. (*Hill v. Colorado (2000) 530 U.S. 703, 716 [147 L. Ed. 2d 597, 120 S. Ct. 2480].*) Accordingly, home contact information is generally considered private. The next question is whether nonmember employees could reasonably expect that their contact information would be shielded from the union.

2. Reasonable, Although Reduced, Expectation of Privacy

[HN15] (11) "A 'reasonable' expectation of privacy is an objective entitlement founded on [***498] broadly based and widely accepted community norms." (*Hill, supra, 7 Cal.4th at p. 37.*) The reasonableness of a

privacy expectation depends on the surrounding context. We have stressed that "customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Id. at p. 36.*)

The practice followed for many years in Los Angeles County contributed to a reasonable expectation of privacy. The County employs approximately 55,000 people. Of this group, 14,500 employees have chosen not to join the union. Throughout the decades that SEIU has been the exclusive bargaining representative of these employees, the County has not given their home contact information to the union. Since 1994, the County and SEIU have used ERCOM, or a third party clearinghouse, to mail *Hudson* notices to nonmember employees. It is undisputed that the County has never disclosed the employees' home addresses or telephone numbers to the union. Considering this long-standing and consistent practice, it was reasonable for nonmember employees to expect that the County would continue to keep their home contact information private.

(12) Nonmember employees gave their home addresses and telephone numbers to the County for the limited purpose of securing employment. [HN16] A job applicant who provides personal information to a prospective employer can reasonably expect that the employer will not divulge the information outside [*928] the entity except in very limited circumstances. For example, various laws require employers to disclose information to governmental agencies, such as the Internal Revenue Service and Social Security Administration, and disclosure may also be necessary for banks or insurance companies to provide employee benefits. (See *Belaire-West Landscape, Inc. v. Superior Court (2007) 149 Cal.App.4th 554, 561 [57 Cal. Rptr. 3d 197]* (*Belaire-West*).) But beyond these required disclosures, it is reasonable for employees to expect that their home contact information will remain private "in light of employers' usual confidentiality customs and practices." (*Ibid.*) The County followed its long-standing custom and practice when it refrained from disclosing the home addresses and telephone numbers of nonunion employees. [***4].

Moreover, as the trial court observed, employees who exercised their right not to associate with the union have a somewhat enhanced privacy expectation. The record reflects that just over half of the approximately 14,500 nonmember employees voluntarily gave home contact information to SEIU when completing their annual *Hudson* notice forms. The remaining 7,222 nonmember employees chose not to disclose this information, although in most cases they had numerous opportunities to do so.

Both courts below determined that County employees had a reasonable expectation of privacy in their home addresses and phone numbers. For the reasons discussed, we agree. However, we note that the reasonableness of this expectation was somewhat reduced in light of the common practice of other public employers to give unions this information.

Custom and practice can reduce reasonable expectations of privacy in information typically considered even more sensitive than addresses and phone numbers. In *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 327 [64 Cal. Rptr. 3d 693, 165 P.3d 488]* (*IFPTE*), a group [**1117] of reporters filed a California Public Records Act (*§ 6250 et seq.*) request for the names, job titles, and gross salaries of City of Oakland employees [***499] earning over $ 100,000. We acknowledged that "many individuals, including public employees, may be uncomfortable with the prospect of others knowing their salary and ... would share that information only on a selective basis, even within the workplace." (*IFPTE, at p. 331.*) We also acknowledged that public disclosure of salary information could cause discomfort and embarrassment. (*Ibid.*) Nonetheless, we concluded the city's employees lacked a reasonable expectation of privacy in light of the Attorney General's long-standing opinion that government payroll information is public, the widespread practice of state and local governments to disclose this information, and the strong public policy favoring transparency in government. (*IFPTE, at pp. 331-332, 338.*) [*929]

As in *IFPTE*, disclosure of employees' home contact information to their union " 'is overwhelmingly the norm.' " (*IFPTE, supra, 42 Cal.4th at p. 332.*) For nearly 30 years, private employers have been required to disclose contact information to employees' unions. (See *Prudential, supra, 412 F.2d at p. 84*; *Excelsior Underwear, Inc., supra, 56 N.L.R.B. at p. 1241.*) Based on these federal precedents, we remarked almost 30 years ago that requiring employers to furnish lists of employee names and addresses to facilitate communication with a union "is hardly novel in the arena of labor relations." (*Certain v. Agricultural Labor Relations Bd., supra, 36 Cal.3d at p. 665.*) As discussed, PERB has held that the same disclosure rules apply to public employment under various California labor statutes, including the MMBA. (See *Golden Empire, supra*, PERB Dec. No. 1704-M, at pp. 6-8; *Bakersfield, supra*, PERB Dec. No. 1263, at p. 22.) Thus, when the information is requested, established precedent requires that all private employers and most public employers provide unions with contact information for all employees in the represented bargaining unit. Although we have concluded that, on balance, it was reasonable for County employees to expect that their information would not be disclosed to SEIU because of the long-standing practice in Los Angeles County, the reasonableness of this privacy expectation was reduced in light of the widespread, settled rules requiring disclosure elsewhere. (See *Pioneer Electronics, supra, 40 Cal.4th at p. 372* [customers who had given their contact information to a manufacturer in connection with a product complaint had a "reduced" expectation of privacy].)

3. *Serious Invasion of Privacy*

[HN17] (13) "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill, supra, 7 Cal.4th at p. 37.*) The disclosure contemplated in this case was more than trivial. It rose to the level of a "serious" invasion of privacy under *Hill*.

In *Dept. of Defense, supra, 510 U.S. 487*, the Supreme Court considered a union request similar to the one SEIU makes here. The court observed: "Perhaps some of these individuals have failed to join the union that represents them due to lack of familiarity with the union or its services. Others may be opposed to their union or to unionism in general on practical or ideological grounds. Whatever the reason that these employees have chosen not to become members of the union or to provide the union with their addresses, however, it is clear that they have some nontrivial privacy interest in [***500] nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure." (*Id. at pp. 500-501*, fn. & italics omitted.) [*930]

In *Pioneer Electronics, supra, 40 Cal.4th at pages 372-373*, we found that disclosure of customer contact information to a class action plaintiff would not impose a serious [*931] invasion of privacy. There, however, the customers had already disclosed their contact information to the manufacturer when complaining about an [**1118] allegedly defective product. The question was whether a second disclosure of that information to a class action plaintiff asserting the same complaint would constitute a serious invasion of privacy. (*Ibid.*) In finding it would not, we observed that the rules of civil discovery generally permit plaintiffs to discover contact information for potential class members in order to identify additional parties who might assist in prosecuting the case. (*Id. at p. 373.*) Courts of Appeal have regularly allowed the release of contact information sought in class action discovery. (See, e.g., *Crab Addison, Inc. v. Superior Court (2008) 169 Cal.App.4th 958, 974 [87 Cal. Rptr. 3d 400]*; *Lee v. Dynamex, Inc. (2008) 166 Cal.App.4th 1325, 1336-1338 [83 Cal. Rptr. 3d 241]*, *Alch v. Superior Court (2008) 165 Cal.App.4th 1412, 1426-1427 [82 Cal. Rptr. 3d 470]*; *Pineda v. Superior Court (2008) 158 Cal.App.4th 1242, 1245 [70 Cal. Rptr. 3d 701]*; *Belaire-West, supra, 149 Cal.App.4th at p. 562.*) Indeed, "it is only under unusual circumstances that the courts restrict discovery of nonparty witnesses' residential contact information." (*Pineda v. Superior Court, supra, 158 Cal.App.4th at p. 1254.*) The context here is different. The party seeking the information is a union the employees have chosen not to join and have declined in the past to give their contact information. Under these circumstances, disclosure to the union would create a more significant invasion of privacy than disclosure in the class action context.

Moreover, the release of contact information contemplated in *Pioneer Electronics* would have occurred only after the customers had been given notice of the proposed disclosure and an opportunity to object. (*Pioneer Electronics, supra, 40 Cal.4th at pp. 372-373.*) These protections mitigated any privacy invasion caused by the disclosure.

4. *Balancing of Interests Favors Disclosure*

(14) Because the County made a sufficient showing on the essential elements of a privacy claim, we next consider whether the invasion of privacy is justified because it would further a substantial countervailing interest. (See *Hill, supra, 7 Cal.4th at p. 40.*) [HN18] "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests

derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Id. at p. 38.*) Here, the balance favors disclosure.

SEIU's interest in obtaining residential contact information for all employees it represents is both legitimate and important. As discussed, a union elected as an [***501] exclusive bargaining agent owes a duty of fair representation to *all* employees in the bargaining unit it represents, including employees who are not union members. (See *Jones v. Omnitrans, supra, 125 Cal.App.4th at p. 283.*)

[HN15] (15) A union breaches the duty of representation if it fails to inform employees about the status of negotiations (*Kern High Faculty Assn. CTA/NEA* (2006) PERB Dec. No. 1834) or changes in the contractual terms of their employment (*Teamsters Local 896 (Anheuser-Busch) (1986) 280 NLRB 363, 373*). Because the union's duty extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees on these important topics. In addition, a union must give nonmembers an opportunity to express their views on bargaining matters, even if these employees do not have a vote. (*El Centro Elementary Teachers Assn.* (1982) PERB Dec. No. 232.) Direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Finally, as discussed, every year the union must send *Hudson* notices to all employees explaining how their dues are used. (*Hudson, supra, 475 U.S. 292.*) [**1119] The obligation to send *Hudson* notices falls on the union, not the employer, and a union commits an unfair business practice if it collects an agency fee without providing a proper notice. (*UPTE, CWA Local 9119* (2005) PERB Dec. No. 1784-H; see *Knight v. Kenai Peninsula Borough School Dist. (9th Cir. 1997) 131 F.3d 807, 817* [employer has no duty to ensure adequacy of union's *Hudson* notice].)

Giving SEIU this contact information will not coerce employees into joining the union. An employee who chooses not to join a union still enjoys the benefits of union representation. "[T]here is a clear distinction between union membership and majority support for collective bargaining representatives." (*N.L.R.B. v. Wallkill Valley General Hospital (3d Cir. 1989) 866 F.2d 632, 637.*)

Moreover, as several decisions on this subject have noted, alternative means for unions to communicate with nonmembers are often inadequate. Bulletin board postings may not meaningfully convey lengthy or complex [*932] information, and employers often monitor the materials posted. (*Prudential, supra, 412 F.2d at pp. 81-82.*) A posting provides only one-way communication and is not as secure for unions to receive employees' views. (*Id. at p. 82.*) Other alternatives, such as union meetings and worksite visits by union representatives, are inefficient and ineffective means of communicating with large and dispersed groups of employees. (See *Golden Empire, supra*, PERB Dec. No. 1704-M, at p. 7.)

In contrast, the privacy intrusion occasioned by disclosure of contact information to the union is reduced. As discussed, County employees' expectation of privacy is undermined by the common practice of disclosure in other settings. For decades, the NLRB has required private employers to furnish unions with employees' home contact information (see, e.g., *Prudential, supra, 412 F.2d at p. 84*), and PERB has required most California public employers to make the same disclosure (see, e.g., *Golden Empire, supra*, PERB Dec. No. 1704-M, at pp. 6-8). The invasion of nonmember employees' privacy, while sufficiently serious to pass muster under the *Hill* test, is also comparatively mild. Nonmember employees may experience increased contact with the union by mail or other means (see *Dept. of Defense, supra, 510 U.S. at pp. 500-501*), but there is no evidence SEIU has ever [***502] engaged in any harassment of a nonmember. If harassment is a concern, employers may bargain for, or ERCOM may adopt, procedures that allow nonmembers to opt out and prevent disclosure of their contact information. (*Cf. § 6254.3, subd. (b)* [allowing certain employees to prevent disclosure of contact information by written request].) Although we have concluded that a balancing of interests generally favors disclosure, this balance might, in some cases, tip in favor of privacy when an individual employee objects and demands that home contact information be withheld.

C. Court May Not Impose Procedural Safeguards In o

blendate Proceeding

A final question raised by the Court of Appeal's decision is the availability of what it termed "procedural safeguards," giving employees the ability to object and prevent disclosure. The court below imposed a notice and opt-out procedure without balancing, or even considering, the union's interests in obtaining the requested information. In creating this procedure, the court expressly ignored labor decisions finding that unions are entitled to contact information and instead likened this case to the discovery of third party information in the class action context. Borrowing from *Pioneer Electronics, supra, 40 Cal.4th 360*, and other class action cases, the Court of Appeal held that nonmember employees had to be given notice and an opportunity to object before the County disclosed their contact information to SEIU. [*933]

(16) The parties here agree that the Court of Appeal overstepped its authority by ordering them to implement specific notice and opt-out procedures. [HN20] *Code of Civil Procedure section 1094.5, subdivision (f)* expressly limits the remedies a court may order when reviewing administrative orders and decisions. The court can deny the writ or grant it and set aside the decision. If it sets aside the decision, the court can order the [**1120] agency to take further action, but it cannot "limit or control in any way the discretion legally vested in" the agency. (*Code Civ. Proc., § 1094.5, subd. (f).*) Here, rather than simply setting aside ERCOM's decision, the Court of Appeal directed the trial court to order (1) that the County and SEIU meet and confer on a proposed notice for the trial court's review and approval; and (2) that the County send the approved notice to all nonmember employees. This disposition exceeded the court's codified authority because it stripped ERCOM of all discretion regarding the manner of disclosure. Further, implementation of the order would have required ERCOM to create new administrative procedures for resolving disputes over notice and opt-out rights.

Although the Court of Appeal exceeded its authority by imposing a notice and opt-out requirement, other avenues for implementing privacy safeguards are available. Employers like the County remain free to bargain for a notice and opt-out procedure in negotiating collective bargaining agreements with employee unions. Public employers can also draft employment contracts that will codify employees their home contact information is subject to disclosure to the union and permit employees to request nondisclosure. Finally, nothing in the relevant statutes or case law appears to prohibit agencies such as PERB or ERCOM from developing notice and opt-out procedures that would allow employees to preserve the confidentiality of their home addresses and telephone numbers.[19]

19 Such procedures have been developed in other public employment settings. For example, employees covered by the California Public Records Act can prevent release of their home addresses and telephone numbers by stating their objection in writing that they do not want this information disclosed to the union. (*§ 6254.3, subd. (b)*; see *Golden Empire, supra*, PERB Dec. No. 1704-M, at p. 5; *State Center Community College Dist.* (2001) PERB Dec. No. 1471, at p. 5.)

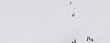
[***503] D. *Conclusion*

(17) Long-standing case law and public policy support direct communication between unions and the employees they represent. On balance, we conclude SEIU's interest in communicating with all County employees significantly outweighs nonmembers' interest in preserving the privacy of their contact information. [*934]

III. DISPOSITION

The Court of Appeal's decision is reversed. The matter is remanded for entry of judgment denying the County's petition for writ of mandate.

Cantil-Sakauye, C. J., Kennard, J., Baxter, J., Werdegar, J., Chin J., and Liu, J., concurred.



In re GREG F., a Person Coming Under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent, v. GREG F., Defendant and Appellant.

S191868

SUPREME COURT OF CALIFORNIA

55 Cal. 4th 393; 283 P.3d 1160; 146 Cal. Rptr. 3d 272; 2012 Cal. LEXIS 8224

August 27, 2012, Filed

SUBSEQUENT HISTORY: Reported at *In re Greg F., 2012 Cal. LEXIS 8855 (Cal., Aug. 27, 2012)*
Time for Granting or Denying Rehearing Extended *In re Greg F., 2012 Cal. LEXIS 8650 (Cal., Sept. 12, 2012)*
Rehearing denied by *In re Greg F., 2012 Cal. LEXIS 10222 (Cal., Oct. 31, 2012)*

PRIOR HISTORY:
Superior Court of Sonoma County, No. 35283J, Raima H. Ballinger, Judge. Court of Appeal, First Appellate District, Division Five, No. A127161.
In re Greg F., 192 Cal. App. 4th 1252, 121 Cal. Rptr. 3d 247, 2011 Cal. App. LEXIS 198 (Cal. App. 1st Dist., 2011)

LexisNexis(R) Headnotes

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Preliminary Proceedings
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN1] Although juvenile delinquency proceedings have been called quasi-criminal, they are fundamentally different from adult criminal proceedings and require that a balance be struck between the informality and flexibility necessary in juvenile proceedings and attention to the juvenile's constitutional rights. One important difference between juvenile delinquency and adult criminal proceedings is the speed with which juvenile proceedings must begin and progress. Much must be completed in a narrow timeframe. When there is reasonable cause to believe a minor has violated a law defining a crime, law enforcement may take the minor into temporary custody. *Welf. & Inst. Code, §§ 602, subd. (a), 625, subd. (a).* If the minor is detained, law enforcement must deliver the minor without unnecessary delay to the probation officer in an appropriate county pursuant to *Welf. & Inst. Code, §§ 626, subd. (f), 626.5, subd. (b)*, and provide the probation officer with incident reports pursuant to *Welf. & Inst. Code, §§ 626, subd. (c), 626.5, subd. (a).*

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Preliminary Proceedings
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN2] A probation officer must immediately investigate the circumstances of a minor and the facts surrounding his or her being taken into custody and determine if continued detention is necessary. *Welf. & Inst. Code, § 628, subd. (a).* If the probation officer determines that the minor is already a ward of the juvenile court, the officer can file a *Welf. & Inst. Code, § 777*, notice. *§ 777, subds. (c), (b).* If the minor is not a ward and the probation officer determines that delinquency proceedings should be initiated, the officer refers the matter to a prosecuting attorney for the filing of a *Welf. & Inst. Code, § 602*, petition. *Welf. & Inst. Code, §§ 630, 650, 653.5, subd. (b)*

. If a § 777 notice or *§ 602* petition is not filed within 48 hours (excluding nonconrt days) after the minor was taken into custody, the minor must be released. *Welf. & Inst. Code, § 631, subd. (a); Cal. Rules of Court, rule 5.752(b).* A detention hearing must be held by the next judicial day after a petition or notice is filed. *Welf. & Inst. Code, § 632, subd. (a).* At the detention hearing, the court reviews the probation officer's report to determine whether continued detention of the minor is necessary. *Welf. & Inst. Code, § 636; Cal. Rules of Court, rule 5.760.*

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Adjudication
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN3] The next step following a *Welf. & Inst. Code, § 602*, petition is the jurisdictional hearing, at which the court decides whether a crime has been committed. *Welf. & Inst. Code, § 701.* Offenses alleged in the *§ 602* petition must be proven true beyond a reasonable doubt and be supported by evidence legally admissible in the trial of criminal cases. *§ 701.* If the minor is detained, the jurisdictional hearing must be held within 15 judicial days after the detention order. *Welf. & Inst. Code, § 637, subd. (a)(1).* The minor may admit the allegations in the *§ 602* petition at the detention hearing and waive further jurisdictional proceedings. *§ 657, subd. (b).*

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN4] Once jurisdiction on a *Welf. & Inst. Code, § 602*, petition is established, the case proceeds to a dispositional hearing. At this hearing, the court considers the probation officer's social study and other evidence to determine an appropriate disposition. *Welf. & Inst. Code, § 706.* In reaching a disposition, the court considers (1) the minor's age, (2) the circumstances and gravity of the offense, and (3) the minor's previous delinquent history. *Welf. & Inst. Code, § 725.5.* The court may place the minor on probation, with or without declaring the minor a ward of the court, or it may declare the minor a ward and order appropriate treatment and placement. *Welf. & Inst. Code, §§ 725, 726.* Placement options include the home of a relative or extended family member, a suitable licensed community care facility or foster home, juvenile hall, a ranch, camp or forestry camp, and, the most restrictive setting, the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. *Welf. & Inst. Code, §§ 727, subd. (a), 730, subd. (a), 731, subd. (a)(4).* The court can also set aside the jurisdictional findings and dismiss the petition if it finds that the interests of justice and the welfare of the minor require a dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. *Welf. & Inst. Code, § 782.*

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN5] The commitment limitation in *Welf. & Inst. Code, § 733, subd. (c)*, provides that a juvenile ward may not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) if the ward has been or is adjudged a ward of the court pursuant to *Welf. & Inst. Code, § 602*, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in *Welf. & Inst. Code, § 707, subd. (b)* (violent felony offenses), or of *Pen. Code, § 290.008, subd. (c)* (sex offenses). Thus, a DJF commitment must be based on a recent violent offense or sex crime adjudicated in a delinquency petition. It cannot be ordered based on a past offense in the ward's juvenile record if the ward's most recent offense does not qualify.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN6] Because the commitment limitation in *Welf. & Inst. Code, § 733, subd. (c)*, depends on the nature of the most recent offense alleged in any petition, the statute does not bar Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitments imposed for probation violations on qualifying offenses. A probation violation procedure is initiated under *Welf. & Inst. Code, § 777*, by the filing of a notice, not a petition. A probation violation proceeding involves a different standard of proof than a *Welf. & Inst. Code, § 602*, proceeding, and it does not result in the charging or adjudication of a criminal offense, even if the conduct alleged is criminal. Moreover, if a violation is established, the most restrictive placement the court can impose is the maximum term of confinement on the original offense for which the ward was placed on probation.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions
[HN8] See *Welf. & Inst. Code, § 782.*

Governments > Legislation > Interpretation
[HN9] A court's fundamental task in construing a statute is to ascertain the Legislature's intent and effectuate the law's purpose. The court begins its inquiry by examining the statute's words, giving them a plain and commonsense meaning. In doing so, however, the court does not consider the statutory language in isolation. Rather, the court looks to the entire substance of the statute in order to determine the scope and purpose of the provision. That is, the court construes the words in question in context, keeping in mind the nature and obvious purpose of the statute. The court must harmonize the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole. The court must also avoid a construction that would produce absurd consequences, which courts presume the Legislature did not intend.

Governments > Legislation > Interpretation
[HN9] When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law."

Governments > Legislation > Interpretation
[HN10] The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.

Governments > Legislation > Effect & Operation > Amendments
Governments > Legislation > Interpretation
[HN11] An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute. Amendments by implication are disfavored and should be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

Governments > Legislation > Interpretation
[HN12] The principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled. If a court can reasonably harmonize two statutes dealing with the same subject, then the court must give concurrent effect to both, even though one is specific and the other general. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.

Governments > Legislation > Interpretation
[HN13] In interpreting a statute, courts are obligated to adopt a common sense construction over one leading to mischief or absurdity.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition
Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN14] The statutory scheme governing juvenile delinquency is designed to give the court maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it. Flexibility is the hallmark of juvenile court law, in both delinquency and dependency interventions. The juvenile court has long enjoyed great discretion in the disposition of juvenile matters, and that discretion is codified in *Welf. & Inst. Code, § 782.* To interpret *Welf. & Inst. Code, § 733, subd. (c),* as cutting off the juvenile court's broad discretion to order an appropriate disposition, simply because the wrong document was filed, would elevate form over substance and create an absurd result the Legislature could not have intended. When a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment for a *Welf. & Inst. Code, § 707, subd. (b),* offense for which probation was ordered serves the interests of justice and the welfare of the minor, the juvenile court has discretion to dismiss a new *Welf. & Inst. Code, § 602,* petition to permit treatment of the matter as a probation violation.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN15] Juvenile proceedings are conducted not only for the protection of society, but for the protection and benefit of the youth involved. Juvenile court action thus differs from adult criminal prosecutions where a major goal is corrective confinement of the defendant for the protection of society. The primitive goal of the juvenile proceeding is that the child shall not become a criminal in later years, but a useful member of society. In contrast to the more punitive aims of the adult criminal justice system, the purpose of the juvenile justice system is (1) to serve the best interests of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and enable him or her to be a law-abiding and productive member of his or her family and community, and (2) to provide for the protection and safety of the public. *Welf. & Inst. Code, § 202.* To this end, the language of *Welf. & Inst. Code, § 782,* specifically requires that any dismissal of a delinquency petition serve both the interests of justice and the welfare of the minor.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN16] A Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) commitment is not necessarily contrary to a minor's welfare. The DJF has many rehabilitative programs that can benefit delinquent wards. Some wards may be best served by the structured institutional environment and special programs available only at the DJF. In determining a child's best interests, the juvenile court must examine all the relevant circumstances.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition
Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN17] The realignment policies served by *Welf. & Inst. Code, § 733,* are not so unyielding they cannot tolerate occasional exceptions when the severity of a minor's offenses, and the minor's own special needs, call for a disposition that includes the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). If the Legislature had meant to impose an absolute prohibition on DJF confinement, it would have removed the court's ability to order a DJF commitment for nonviolent probation violations. Moreover, there is no reason to assume juvenile courts will ignore the policies underlying *§ 733* when they exercise their discretion to dismiss a *Welf. & Inst. Code, § 602,* petition. In deciding whether a dismissal that would qualify an otherwise ineligible minor for a DJF commitment serves the interests of justice and the minor's welfare, the court must take into account all circumstances relevant to the public's need for safety and the juvenile's need for rehabilitation. Where the minor has previously failed in a series of local programs, or where no local programs will accept the minor, statewide confinement in the structured setting offered by DJF may decisively outweigh other considerations.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN18] Termination of jurisdiction is one logical outcome to expect when the juvenile court dismisses a delinquency petition. The Legislature did not necessarily foreclose other outcomes when it enacted *Welf. & Inst. Code, § 782,* however. *Section 782* was meant to codify and expand the juvenile court's discretionary dismissal power.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition
Family Law > Delinquency & Dependency > Delinquency Proceedings
[HN19] If a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment is appropriate in the context of a probation revocation, then it remains appropriate even if the prosecution files a *Welf. & Inst. Code, § 602,* petition that has to be withdrawn or dismissed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The juvenile court rendered a disposition order committing a minor to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF).

While the minor was on probation for a DJF-eligible violent felony offense (*Welf. & Inst. Code, § 707, subd. (b)*), he committed a new offense that was not DJF-eligible (*Welf. & Inst. Code, § 733, subd. (c)*). The prosecutor filed a new petition (*Welf. & Inst. Code, § 602*). The juvenile court dismissed the new petition and treated the matter as a probation violation. (Superior Court of Sonoma County, No. 352831, Raima H. Ballinger, Judge.) The Court of Appeal, First Dist, Div. Five, No. A127161, reversed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court for further proceedings. The court held that the juvenile court had discretion to dismiss the new petition (*Welf. & Inst. Code, § 782*) in order to commit the minor to DJF, based upon the juvenile court's finding that such a dismissal would best serve the interests of justice and the welfare of the minor. Where a DJF commitment is appropriate in the context of a probation revocation initiated by the filing of a notice (*Welf. & Inst. Code, § 777*), it remains appropriate even if the prosecution files a new *§ 602* petition that is withdrawn or dismissed. The court noted that the unusually short deadlines in juvenile delinquency matters leave the prosecution little time to investigate a minor's criminal history and to determine whether an offense should be alleged in a new petition or as a probation violation. (Opinion by Corrigan, J., with Baxter, Werdegar, and Chin, JJ., concurring. Dissenting opinion by Cantil-Sakauye, C. J., with Kennard, and Liu, JJ., concurring (see p. 420).)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Delinquent, Dependent and Neglected Children § 83--Delinquent Children--Proceedings.--Although juvenile delinquency proceedings [*394] have been called quasi-criminal, they are fundamentally different from adult criminal proceedings and require that a balance be struck between the informality and flexibility necessary in juvenile proceedings and attention to the juvenile's constitutional rights. One important difference between juvenile delinquency and adult criminal proceedings is the speed with which juvenile proceedings must begin and progress. Much must be completed in a narrow timeframe.

(2) Delinquent, Dependent and Neglected Children § 84--Delinquent Children--Detention Hearing--Time and Scope.--When there is reasonable cause to believe a minor has violated a law defining a crime, law enforcement may take the minor into temporary custody (*Welf. & Inst. Code, §§ 602, subd. (a), 625, subd. (a)*). If the minor is detained, law enforcement must deliver the minor without unnecessary delay to the probation officer in an appropriate county (*Welf. & Inst. Code, §§ 626, subd. (d), 626.5, subd. (b)*) and provide the probation officer with incident reports (*Welf. & Inst. Code, §§ 626, subd. (c), 626.5, subd. (a)*). The probation officer must immediately investigate the circumstances of a minor and the facts surrounding his or her being taken into custody and determine if continued detention is necessary (*Welf. & Inst. Code, § 628, subd. (a)*). If the probation officer determines that the minor is already a ward of the juvenile court, the officer can file a *Welf. & Inst. Code, § 777* notice (*§ 777, subds. (a), (b)*). If the minor is not a ward and the probation officer determines that delinquency proceedings should be initiated, the officer refers the matter to a prosecuting attorney for the filing of a *Welf. & Inst. Code, § 602* petition (*Welf. & Inst. Code, §§ 630, 650, 653.5, subd. (b)*). If a *§ 777* notice or *§ 602* petition is not filed within 48 hours (excluding noncourt days) after the minor was taken into custody, the minor must be released (*Welf. & Inst. Code, § 631, subd. (a); Cal. Rules of Court, rule 5.752(b)*). A detention hearing must be held by the next judicial day after a petition or notice is filed (*Welf. & Inst. Code, § 632, subd. (a)*). At the detention hearing, the court reviews the probation officer's report to determine whether continued detention of the minor is necessary (*Welf. & Inst. Code, § 636; Cal. Rules of Court, rule 5.760*).

(3) Delinquent, Dependent and Neglected Children § 95--Delinquent Children--Jurisdiction Hearing--Time and Scope.--The next step following a *Welf. & Inst. Code, § 602* petition is the jurisdictional hearing, at which the court decides whether a crime has been committed (*Welf. & Inst. Code, § 701*). Offenses alleged in the *§ 602* petition must be proven true beyond a reasonable doubt and be supported by evidence legally admissible in the trial of criminal cases (*§ 701*). If the minor is detained, the jurisdictional hearing must be held within 15 judicial days after the detention order (*Welf. & Inst. Code, § 657, subd. (a)(1)*). The minor may admit the allegations in the *§ 602* petition at the detention hearing and waive further jurisdictional proceedings (*§ 657, subd. (b)*).

(4) Delinquent, Dependent and Neglected Children § 105--Delinquent Children--Dispositional Hearing--Options.--Once jurisdiction on a *Welf. & Inst. Code, § 602*, petition is established, the case proceeds to a dispositional hearing. At this hearing, the court considers the probation officer's social study and other evidence to determine an appropriate disposition (*Welf. & Inst. Code, § 706*). In reaching a disposition, the court considers (1) the minor's age, (2) the circumstances and gravity of the offense, and (3) the minor's previous delinquent history (*Welf. & Inst. Code, § 725.5*). The court may place the minor on probation, with or without declaring the minor a ward of the court, or it may declare the minor a ward and order appropriate treatment and placement (*Welf. & Inst. Code, §§ 725, 726*). Placement options include the home of a relative or extended family member; a suitable licensed community care facility or foster home; juvenile hall; a ranch, camp or forestry camp; and, the most restrictive setting, the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (*Welf. & Inst. Code, §§ 727, subd. (a), 730, subd. (a), 731, subd. (a)(4)*). The [*395] court can also set aside the jurisdictional findings and dismiss the petition if it finds that the interests of justice and the welfare of the minor require a dismissal, or if it finds that the minor is not in need of treatment or rehabilitation (*Welf. & Inst. Code, § 782*).

(5) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Qualifying Offenses.--The commitment limitation in *Welf. & Inst. Code, § 733, subd. (c)*, provides that a juvenile ward may not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) if the ward has been or is adjudged a ward of the court pursuant to *Welf. & Inst. Code, § 602*, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in *Welf. & Inst. Code, § 707, subd. (b)* (violent felony offenses), or of *Pen. Code, § 290.008, subd. (c)* (sex offenses). Thus, a DJF commitment must be based on a recent violent offense or sex crime adjudicated in a delinquency petition. It cannot be ordered based on a past offense in the ward's juvenile record if the ward's most recent offense does not qualify.

(6) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Qualifying Offenses--Probation Violations.--Because the commitment limitation in *Welf. & Inst. Code, § 733, subd. (c)*, depends on the nature of the most recent offense alleged in any petition, the statute does not bar Department of [*396] Corrections and Rehabilitation, Division of Juvenile Facilities commitments imposed for probation violations on qualifying offenses. A probation violation procedure is initiated under *Welf. & Inst. Code, § 777*, by the filing of a notice, not a petition. A probation violation proceeding involves a different standard of proof than a *Welf. & Inst. Code, § 602* proceeding, and it does not result in the charging or adjudication of a criminal offense, even if the conduct alleged is criminal. Moreover, if a violation is established, the most restrictive placement the court can impose is the maximum term of confinement on the original offense for which the ward was placed on probation.

(7) Statutes § 29--Construction--Language--Legislative Intent--Purpose of Law.--A court's fundamental task in construing a statute is to ascertain the Legislature's intent and effectuate the law's purpose. The court begins its inquiry by examining the statute's words, giving them a plain and commonsense meaning. In doing so, however, the court does not consider the statutory language in isolation. Rather, the court looks to the entire substance of the statute in order to determine the scope and purpose of the provision. That is, the court construes the words in question in context, keeping in mind the nature and obvious purpose of the statute. The court must harmonize the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole. The court must also avoid a construction that would produce absurd consequences, which courts presume the Legislature did not intend.

(8) Statutes § 29--Construction--Language--Legislative Intent--Contrary Law.--When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law."

(9) Statutes § 46--Construction--Presumptions--Legislative Intent--Existing Law.--The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. The failure of the Legislature to change the law in a particular respect when the subject is

generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.

(10) Statutes § 13--Amendment--By Implication.--An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute. Amendments by implication are disfavored and should be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two [*397] statutes, such as where they are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

(11) Statutes § 52--Construction--Codes--Conflicting Provisions--General and Specific Provisions--Harmonization.--The principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled. If a court can reasonably harmonize two statutes dealing with the same subject, then the court must give concurrent effect to both, even though one is specific and the other general. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.

(12) Statutes § 22--Construction--Common Sense.--In interpreting a statute, courts are obligated to adopt a common sense construction over one leading to mischief or absurdity.

(13) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Discretion of Court--The statutory scheme governing juvenile delinquency is designed to give the court maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it. Flexibility is the hallmark of juvenile court law, in both delinquency and dependency interventions. The juvenile court has long enjoyed great discretion in the disposition of juvenile matters, and that discretion is codified in *Welf. & Inst. Code, § 782*. To interpret *Welf. & Inst. Code, § 733, subd. (c)*, as cutting off the juvenile courts broad discretion to order an appropriate disposition, simply because the wrong document was filed, would elevate form over substance and create an absurd result the Legislature could not have intended. When a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment for a *Welf. & Inst. Code, § 707, subd. (b)*, offense for which probation was ordered serves the interests of justice and the welfare of the minor, the juvenile court has discretion to dismiss a new *Welf. & Inst. Code, § 602* petition to permit treatment of the matter as a probation violation. (Disapproving to the extent inconsistent: *P.C. v. Superior Court (2009) 175 Cal.App.4th 1435 [96 Cal. Rptr. 3d 851].*)

(14) Delinquent, Dependent and Neglected Children § 105--Delinquent Children--Dispositional Hearing--Best Interests of Minor.--Juvenile proceedings are conducted not only for the protection of society, but for the protection and benefit of the youth involved. Juvenile court action thus differs from adult criminal prosecutions where a major goal is corrective confinement of the defendant for the protection of society. The protective goal of the juvenile proceeding is that the child shall not become a criminal in later years, but a useful member of society. In [*398] contrast to the more punitive aims of the adult criminal justice system, the purpose of the juvenile justice system is (1) to serve the best interests of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and enable him or her to be a law-abiding and productive member of his or her family and community, and (2) to provide for the protection and safety of the public (*Welf. & Inst. Code, § 202*). To this end, the language of *Welf. & Inst. Code, § 782*, specifically requires that any dismissal of a delinquency petition serve both the interests of justice and the welfare of the minor.

(15) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Best Interests of Minor.--A Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) commitment is not necessarily contrary to a minor's welfare. The DJF has many rehabilitative programs that can benefit delinquent wards. Some wards may be best served by the structured institutional environment and special programs available only at the DJF. In determining a child's best interests, the juvenile court must examine all the relevant circumstances.

(16) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Qualifying Offenses.--The realignment policies served by *Welf. & Inst. Code, § 733*, are not so unyielding they cannot tolerate occasional exceptions when the severity of a minor's offenses, and the minor's own special needs, call

for a disposition that includes the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). If the Legislature had meant to impose an absolute prohibition on DJF confinement, it would have removed the court's ability to order a DJF commitment for nonviolent probation violations. Moreover, there is no reason to assume juvenile courts will ignore the policies underlying *§ 733* when they exercise their discretion to dismiss a *Welf. & Inst. Code, § 602* petition. In deciding whether a dismissal that would qualify an otherwise ineligible minor for a DJF commitment serves the interests of justice and the minor's welfare, the court must take into account all circumstances relevant to the public's need for safety and the juvenile's need for rehabilitation. Where the minor has previously failed in a series of local programs, or where no local programs will accept the minor, statewide confinement in the structured setting offered by DJF may decisively outweigh other considerations.

(17) Delinquent, Dependent and Neglected Children § 105--Delinquent Children--Dispositional Hearing--Discretionary Dismissal Power.--Termination of jurisdiction is one logical outcome to expect when [*399] the juvenile court dismisses a delinquency petition. The Legislature did not necessarily foreclose other outcomes when it enacted *Welf. & Inst. Code, § 782*, however. *Section 782* was meant to codify and expand the juvenile court's discretionary dismissal power.

(18) Delinquent, Dependent and Neglected Children § 113--Delinquent Children--Dispositions--Commitment--Qualifying Offenses.--If a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment is appropriate in the context of a probation revocation, then it remains appropriate even if the prosecution files a *Welf. & Inst. Code, § 602* petition that has to be withdrawn or dismissed.

(19) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Qualifying Offenses.--The juvenile court had authority to dismiss a *Welf. & Inst. Code, § 602* petition. Dismissal of the petition, for the purpose of allowing a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment on the minor's previously sustained *§ 602* petition, was not precluded by statute. A dismissal for this purpose is appropriate under *Welf. & Inst. Code, § 782*, so long as the juvenile court, in its discretion, finds that the dismissal is required by the interests of justice and the welfare of the minor.

[Erwin et al., Cal. Criminal Defense Practice (2012) ch. 124, § 124.23; 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 951.]

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JUDGES: Opinion by Corrigan, J., with Baxter, J., Werdegar, and Chin, JJ., concurring. Dissenting opinion by Cantil-Sakauye, C. J., with Kennard, J., and Liu, J., concurring.

OPINION BY: Corrigan [*400]

OPINION

[**152] [***275] CORRIGAN, J.--This case involves the interplay between two statutes governing juvenile delinquency dispositions. *Welfare and Institutions Code section 733, subdivision (c)* (*section 733(c)*[1]) establishes a general rule that a ward cannot be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF), unless "*the most recent offense* alleged in any petition and admitted or found to be true by the court" (italics added) is one of the violent offenses listed in *section 707, subdivision (b)* (*section 707(b)*). On the other hand, *section 782* provides that the juvenile court has the power to dismiss any wardship petition if "the interests of justice and the welfare of the minor require such dismissal ...."

1 All unspecified statutory references are to the Welfare and Institutions Code.

These two provisions may both come into play when

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a ward on probation for a DJF-eligible offense commits a new offense that is not listed in *section 707(b)*. If the prosecution files a notice of a probation violation under *section 777* (*777* notice), the court has the power to revoke the ward's probation and commit the ward to DJF. However, if the prosecution files a new *section 602* petition (*602* petition), the plain language of *section 733(c)* will prohibit the court from ordering a DJF commitment if the allegation is admitted or found true because the new offense is the "most recent offense alleged in any petition" and is not DJF eligible. The question arises whether, under these circumstances, the juvenile court may use its broad discretion under *section 782* to dismiss the second petition so that the matter can be treated as a probation violation, allowing the ward to be committed to DJF. Based on the plain language of the statutes, legislative history, and the policies served by the juvenile court law, we conclude the court has that discretion.

[**1163] I. BACKGROUND

A. *September 2008 Assault on Joseph C.*

On September 16, 2008, 11-year-old Joseph C. was riding his bicycle in Santa Rosa when a car stopped next to him. The minor, Greg F., and two other boys jumped out, yelling Norteño gang slogans and displaying gang hand signs. The minor hit Joseph on the head with a baseball bat, knocking him off his bicycle. The minor tried to take the bicycle, but Joseph clung to it. Joseph was airlifted to the hospital and underwent surgery. He was hospitalized for seven days and suffered lingering neurological damage.

The ensuing *602* petition alleged the minor had committed assault with a deadly weapon and by means of force likely to produce great bodily injury [*401] (*Pen. Code, §-245, subd. (a)(1)*), had personally inflicted great bodily injury (*Pen. Code, § 12022.7, subd. (a)*), and had acted for the benefit of a criminal street gang (*Pen. Code, § 186.22, subd. (b)(1)(C)*). The minor admitted each of the allegations, and the petition was sustained. Because "[a]ssault [**1276] by any means of force likely to produce great bodily injury" is one of the offenses listed in *section 707(b)*, the minor was eligible for a DJF commitment. (*§ 707(b)(14)*; see *§ 733(c)*.) The maximum term was 17 years.

The probation department unanimously recommended a commitment to DJF based on "the minor's callous act of violence upon a young victim, who continues to be emotionally and physically [a]ffected by the minor's actions, the minor's lack of remorse for the victim, and the risk he poses to the community." Due to the severity of his offense, the minor was not considered a suitable candidate for the department's placement services. Moreover, the department believed DJF could best provide him with "appropriate and necessary treatment and rehabilitation services." The juvenile court declared the minor a ward of the court but rejected the probation department's recommended disposition and instead ordered an out-of-home placement. This placement was terminated after five months because the minor refused to participate in treatment. Staff voiced concern over the minor's entrenched gang involvement and lack of empathy for his victim. On June 11, 2009, the minor was detained in juvenile hall pending identification of another suitable placement.

B. *August 2009 Battery in Juvenile Hall*

On August 16, 2009, during dinner at the juvenile hall, the minor and two other Norteño gang members suddenly stood up and attacked three Sureño gang members sitting nearby. Punches were exchanged. Juvenile hall staff members were initially unable to break up the fight.

The district attorney filed a new *602* petition on August 18, 2009, alleging the minor had committed two offenses: (1) battery for the benefit of a gang (*Pen. Code, §§ 186.22, subd. (d), 242*) and (2) knowing participation in a gang (*Pen. Code, § 186.22, subd. (a)*). Neither offense is "described in *subdivision (b) of Section 707*." (*§ 733(c)*.) At the detention hearing the next morning, the minor admitted the battery offense and associated gang enhancement. In return, the district attorney dismissed the gang participation count. The juvenile court accepted the admission and set the matter for a disposition hearing.

Three days later, with the probation officer's concurrence, the district attorney filed an ex parte request to consider a motion to "withdraw" the minor's plea. The following Monday, the prosecutor filed a notice of probation violation under *section 777*, based on the assault in juvenile hall. The [*402] prosecutor admitted having filed the *602* petition in error, rather than proceeding by way of a probation violation. He asked the court to withdraw the minor's plea and strike the petition, explaining that the prosecution was "trying to get to a [DJF-eligible] offense" related to the prior petition

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because of the probation department's concerns. In particular, he noted, "there aren't any placements that are willing to accept Greg and we don't have anywhere to put him." With the court's permission, the prosecutor filed a formal motion to set aside the minor's admission and dismiss the August 18, 2009 petition. After full briefing and argument, the court granted the motion, dismissing the August 18, 2009 petition in the interests of justice and the [**1164] minor's welfare. (*§ 782*.) The court explained that it dismissed the new *602* petition to create the "best options" for disposition.

The minor subsequently admitted the *section 777* probation violation. The court referred the matter to probation for an updated recommendation on disposition. The matter was continued several times to [***277] determine whether the minor could be successful in juvenile hall or in another placement short of DJF. When the disposition hearing was held on February 3, 2010, the probation officer reported that the minor had been involved in yet another assault an a rival gang member in juvenile hall. Moreover, in light of his gang involvement and violent behavior in juvenile hall, none of the placement programs the probation officer had contacted were willing to accept the minor. The court committed the minor to DJF and set the maximum term of confinement at 17 years.

This dispositional order was reversed on appeal. The Court of Appeal held that *section 733(c)* limits a juvenile court's authority to dismiss a petition under *section 782*, and the court could not commit the minor to DJF based on the August 18, 2009 petition. In reaching that conclusion, the appellate court agreed with *I.C. v. Superior Court (2009) 173 Cal.App.4th 1455 [93 Cal. Rptr. 3d 851]* (*I.C.*) and rejected the contrary reasoning in *In re J.L. (2008) 168 Cal.App.4th 43 [85 Cal. Rptr. 3d 35]* (*J.L.*). We granted review to resolve the conflicting case law. We now hold that *section 733(c)* does not deprive the juvenile court of its discretion to dismiss a *602* petition and commit a ward to DJF when, in compliance with *section 782*, such a dismissal is in the interests of justice and for the benefit of the minor.

II. DISCUSSION

The minor argues the juvenile court lacked authority to dismiss his *602* petition for two reasons. First, he asserts the limitation on DJF commitments in *section 733(c)* is a more specific, later-enacted statute that overrides *section 782*. Second, he contends *section 782* may only be used to terminate jurisdiction over a minor. Because the dismissal here was used to "reach [*403] back" to an earlier petition and commit an otherwise ineligible ward to DJF, the minor claims the dismissal was not "in the interests of justice," as required by *section 782*. We reject both of these arguments.

A. *Summary of Juvenile Delinquency Proceedings*

[BN1] (1) Although juvenile delinquency proceedings have been called "quasi-criminal" (*In re Z. v. Superior Court (1970) 3 Cal.3d 797, 801 [91 Cal. Rptr. 594, 478 P.2d 26]*), we have also observed that they are "fundamentally different' from adult criminal proceedings" and require "that a 'balance' be struck between the 'informality' and 'flexibility' " necessary in juvenile proceedings and attention to the juvenile's constitutional rights. (*Alfredo A. v. Superior Court (1994) 6 Cal.4th 1212, 1215 [26 Cal. Rptr. 2d 623, 865 P.2d 56]*.) One important difference between juvenile delinquency and adult criminal proceedings is the speed with which juvenile proceedings must begin and progress. (See *id. at p. 1216*.) Much must be completed in a narrow timeframe.

(2) When there is reasonable cause to believe a minor has violated a law defining a crime, law enforcement may take the minor into temporary custody. (*§§ 602, subd. (a), 625, subd. (a)*.) If the minor is detained, law enforcement must deliver the minor "without unnecessary delay" to the probation officer in an appropriate county (*§§ 626, subd. (d), 626.5, subd. (b)*) and provide the probation officer with incident reports (*§§ 626, subd. (c), 626.5, subd. (a)*). [BN2] The probation officer must "immediately investigate the circumstances of the minor and the facts surrounding his or her being taken into custody" and determine if continued detention is necessary. (*§ 628, subd. (a); see § 628.1*.) If the probation officer determines that the minor is already a ward of the juvenile court, the [***278] officer can file a *777* notice. (*§ 777, subds. (a), (b)*.) If the minor is not a ward and the probation officer determines that delinquency proceedings should be initiated, the officer refers the matter to a prosecuting attorney for the filing of a *602* petition. (*§§ 630, 650, 653.5, subd. (b)*.) [**1165]

If a *777* notice or *602* petition is not filed within 48 hours (excluding noncourt days) after the minor was taken into custody, the minor must be released. (*§ 631, subd. (a); In re Daniel H. (1996) 47 Cal.App.4th 1151, 1154-1155 [55 Cal. Rptr. 2d 17]*, *Cal. Rules of Court,*

rule 5.732(b).) A detention hearing must be held by the next judicial day after a petition or notice is filed. *(§ 632, subd. (a).)* At the detention hearing, the court reviews the probation officer's report to determine whether continued detention of the minor is necessary. *(§ 636; Cal. Rules of Court, rule 5.760.)*

[HN3] (3) The next step following a *602* petition is the jurisdictional hearing, at which the court decides whether a crime has been committed. *(§ 701.)* [*404] Offenses alleged in the *602* petition must be proven true "beyond a reasonable doubt" and be "supported by evidence ... legally admissible in the trial of criminal cases." *(§ 701; accord, In re Eddie M. (2003) 31 Cal.4th 480, 487 [3 Cal. Rptr. 3d 119, 73 P.3d 1113].)* If the minor is detained, the jurisdictional hearing must be held within 15 judicial days after the detention order. *(§ 637, subd. (a)(1).)* As in this case, the minor may admit the allegations in the *602* petition at the detention hearing and waive further jurisdictional proceedings. *(§ 657, subd. (b).)*

[HN4] (4) Once jurisdiction on a *602* petition is established, the case proceeds to a dispositional hearing. At this hearing, the court considers the probation officer's social study and other evidence to determine an appropriate disposition. *(§ 706.)* In reaching a disposition, the court considers (1) the minor's age, (2) the circumstances and gravity of the offense, and (3) the minor's previous delinquent history. *(§ 725.)* The court may place the minor on probation, with or without declaring the minor a ward of the court, or it may declare the minor a ward and order appropriate treatment and placement. *(§§ 725, 726.)* Placement options include the home of a relative or extended family member; a suitable licensed community care facility or foster home; juvenile hall; a ranch, camp or forestry camp; and, the most restrictive setting, DJF. *(§§ 727, subd. (a), 730, subd. (a), 731, subd. (a)(4).)* The court can also set aside the jurisdictional findings and dismiss the petition if it finds that the interests of justice and the welfare of the minor require a dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. *(§ 782.)*

B. *Section 733(c) Does Not Deprive the Court of Its Discretion Under Section 782*

[HN5] (5) *Section 733(c)*'s commitment limitation provides that a juvenile ward may not be committed to DJF if "[t]he ward has been or is adjudged a ward of the court pursuant to *Section 602*, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in *subdivision (b) of Section 707* ([violent felony offenses]) or *subdivision (e) of Section 290.008 of the Penal Code* ([sex offenses])." Thus, a DJF commitment must be based on a recent violent offense or sex crime adjudicated in a delinquency petition. It cannot be ordered based on a past offense in the ward's juvenile record if the ward's most recent offense does not qualify.

[HN6] (6) Because *section 733(c)*'s commitment limitation depends on the nature of "the most recent offense alleged in any *petition*" (italics added), the statute does [***279] not bar DJF commitments imposed for probation violations on qualifying offenses. *(In re D.J. (2010) 185 Cal.App.4th 278, 286 [110 Cal. Rptr. 3d 261]; In re M.B. (2007) 174 Cal.App.4th 1472, 1476 [95 [*405] Cal. Rptr. 3d 359]; J.L., supra, 168 Cal.App.4th at p. 60.)* When the voters enacted Proposition 21 in 2000, they replaced the supplemental petition procedure formerly used under *section 777* with a notice procedure. *(In re Eddie M., supra, 31 Cal.4th at pp. 489, 491.)* Thus, a probation violation procedure is initiated under *section 777* by the filing of a *notice*, not a petition. *(J.L., at pp. 58-59.)* Significantly, a probation violation proceeding involves a different standard of proof than a *section 602* proceeding, and it does not result in the charging or adjudication of a criminal offense, even if the conduct alleged is criminal. *(In re Eddie M., at p. 506; J.L., at pp. 59-60.)* Moreover, if a [**1166] violation is established, the most restrictive placement the court can impose is the maximum term of confinement on the original offense for which the ward was placed on probation. *(John L. v. Superior Court (2004) 33 Cal.4th 158, 165 [14 Cal. Rptr. 3d 261, 91 P.3d 205].)*

In June 2009, Greg F. was placed on probation and detained in juvenile hall. The maximum term of confinement for his violent, gang-motivated assault on Joseph C. was 17 years. Just two months later, the minor committed a second, although less violent, assault on rival gang members in juvenile hall. This second offense could have been alleged in a *777* notice and treated as a probation violation. Had the district attorney followed this course, the minor does not dispute that he could have been committed to DJF for up to 17 years as punishment for the original offense. If a ward's most recent offense is alleged in a *777* notice, as opposed to a *602* petition, *section 733(c)* does not apply. However, the prosecutor mistakenly brought the minor's new offense before the

court in a *602* petition rather than a *777* notice. The question now is whether the trial court had discretion to dismiss the *602* petition, after the minor had admitted the non-DJF-eligible offense there alleged, and treat the matter as a probation violation.

"Juvenile courts have long had the authority to dismiss juvenile matters at the disposition stage of proceedings. *(In re W.B.W. (1971) 17 Cal. App. 3d 1025, 1026 [95 Cal. Rptr. 154].)* Such authority was statutorily expressed between 1915 and 1961. *(Ibid.)* When the entire juvenile court law was repealed and recodified in 1961, without enactment of a general dismissal provision, the reviewing court in *In re W.B.W.* concluded juvenile courts nevertheless properly continued the practice of exercising discretion to dismiss juvenile matters. *(Ibid.)* It noted: 'The [juvenile] court is accorded great discretion in its disposition of juvenile matters. It may at any time modify or vacate a dispositional order and may entirely terminate its jurisdiction when it is satisfied that further supervision is unnecessary [citations]. It would be inconsistent with the liberal termination provisions and the general thrust of the juvenile court law to hold that the referee, at the time of original disposition, could not dismiss the case if he felt that court supervision would be unnecessary and perhaps harmful.' *(Id. at p. 1027,* fns. omitted.) Shortly after the decision in *In re W.B.W.*, the Legislature drafted *section 782*, [*406] restoring to the juvenile law the same power of the court to dismiss juvenile petitions in the interests of justice.' *(Derek L. v. Superior Court (1982) 137 Cal. App. 3d 228, 232 [186 Cal. Rptr. 870] ... fn. 2 (W.C., supra, 173 Cal.App.4th [***280] at pp. 1463-1464,* fn. omitted.)

Section 782 describes the juvenile court's discretion to dismiss delinquency petitions. It states, in relevant part: [HN7] "A judge of the juvenile court in which a petition was filed, at any time before the minor reaches the age of 21 years, may dismiss the petition or may set aside the findings and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require such dismissal, or if it finds that the minor is not in need of treatment or rehabilitation." *(§ 782.)*

(7) Determining whether the commitment limitation of *section 733(c)* prevails over the dismissal discretion granted by *section 782* requires analysis of these statutes in accordance with long-standing principles of interpretation. [HN8] Our fundamental task in construing a statute "is to ascertain the Legislature's intent [and] effectuate the law's purpose. [Citation]. We begin our inquiry by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] In doing so, however, we do not consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute ... in order to determine the scope and purpose of the provision ... .' [Citation.]' [Citation.] That is, we construe the words to question "'in context, keeping to mind the nature and obvious purpose of the statute ... .'" [Citation.]' [Citation.] We must harmonize 'the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole.' [Citations.] We must also avoid a construction that would produce absurd consequences, which we presume [**1167] the Legislature did not intend. [Citation.]" *(People v. Almendez (2003) 23 Cal.4th 896, 909-910 [98 Cal. Rptr. 2d 431, 4 P.3d 265].)*

1. *Statutory Language*

(8) Nothing in the language of *section 733* indicates that the Legislature intended this provision to override the juvenile court's discretion to dismiss a petition when dismissal is in the interests of justice and for the welfare of the minor. *(§ 782.) Section 733(c)* does not mention *section 782*, nor does it state that its provisions prevail over *section 782*, or any other law. [HN9] When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law." *(See Nickens v. Department of Motor Vehicles (2002) 172 Cal.App.4th 974, 995 [91 Cal. Rptr. 3d 792]; Chilber Bodywerks, Inc. v. Superior Court (2003) 134 Cal.App.4th 365, 366 [*407] [36 Cal. Rptr. 3d 31].)* The Legislature did not include this language in *section 733(c)*, nor did it amend *section 782* to prohibit dismissals to permit a DJF commitment.

(9) The absence of such an express limitation on the juvenile court's power under *section 782* is significant. [HN10] The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. *(Voters for Responsible Retirement v. Board of Supervisors (1994) 8 Cal.4th 765, 779, fn. 3 [35 Cal. Rptr. 2d 814, 884 P.2d 645]; In re Michael G. (1998) 64 Cal.2d 283, 293 [43 Cal. Rptr. 224, 747 P.2d 1152].)* "The failure of the Legislature to change the law in a particular respect when the subject is generally before it

and changes in other respects are made is indicative of no intent to leave the law as it stands in the aspects not amended.' [Citations.]" (*Estate of McDill (1975) 14 Cal.3d 831, 837-838 [122 Cal. Rptr. 754, 537 P.2d 874].*) For over 40 years, *section 782* [***281] has given juvenile courts the power to dismiss a delinquency petition if doing so serves the interests of justice and the welfare of the minor. (Stats. 1971, ch. 607, § 1, p. 1211.) If the Legislature had intended to deprive courts of this long-held dispositionary power when a dismissal would conflict with *section 733(c)*, it could have easily made this intent plain. It did not.

. (10) The minor argues that *section 733(c)* must prevail over *section 782* because it is the more specific and later-enacted statute. However, this argument has two flaws. First, even under his reading of the statute, the minor concedes that a limitation on discretion must be implied. *Section 733(c)* is not more specific than *section 782* on this point. Indeed, it does not mention a limit on *section 782* discretion at all. [FN11] * 'An implied amendment is an act that creates no addition, omission, modification or substitution and changes the scope or effect of an existing statute.' [Citation.] Amendments by implication are disfavored and should be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation ..." [Citation.]' [Citation.]" (*In re Sean W. (2003) 127 Cal.App.4th 1177, 1187 [26 Cal. Rptr. 3d 248].*) Second, the two provisions are not irreconcilably in conflict. (11) As we have noted, [FN12] "'[t]he principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled. [Citations.]' [Citation.] If we can reasonably harmonize '[two statutes dealing with the same subject,' then we must give 'concurrent effect' to both, 'even though one is specific and the other general. [Citations.]' [Citation.]" (*Garcia v. McCutchen (1997) 16 Cal.4th 469, 478 [66 Cal. Rptr. 2d 319, 940 P.2d 906].*) "The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.' [Citations.]" (*In re Gladys R. (1970) 1 Cal.3d 855, 861 [83 Cal.Rptr. 671, 464 P.2d 127].*) [*408]

Sections 733(c) and *782* can be harmonized. *Section 733(c)* prohibits a commitment to DJF unless the minor's most recent offense alleged in a petition is of a particular

class. If the juvenile court exercises its discretion under *section 782* to dismiss a *602* petition, its decision does not nullify or abrogate *section 733(c)*. It simply changes the [**1168] "most recent offense alleged in *any* petition" to which *section 733(c)* applies *in that particular case*. In a great many cases, the minor's DJF eligibility will be based on the most recent offense alleged in a new *602* petition, in accordance with *section 733(c)*. However, if the minor has been given an opportunity to benefit from probation after committing a DJF-eligible offense, and then goes on to commit a new offense while on probation, the interests of justice and the welfare of the minor may be best served by a DJF commitment. *Section 782* gives the juvenile court a discretionary tool in such cases to control the operative petition for purposes of *section 733(c)* and, consequently, expand its dispositional options. Allowing *section 782* dismissals in the interests of justice and for the minor's welfare thus gives effect to *both* statutes.

Nor would allowing discretionary dismissals under *section 782* frustrate the legislative purposes behind *section 733(c)*. *Section 733(c)* simply provides that a minor may not be committed to DJF if the most recent offense *admitted and found true following a 602 petition* is not a qualifying offense. It cannot be ordered based on a past offense in the minor's juvenile record if the minor's recent offenses are nonviolent. As noted, however, because *section 733(c)* [***282] speaks to conduct alleged in a "petition," it does not prohibit the court from ordering DJF commitments for probation violations on qualifying offenses. (*In re D.J., supra, 183 Cal.App.4th at p. 286; In re M.B., supra, 174 Cal.App.4th at p. 1476; J.L., supra, 168 Cal.App.4th at p. 60.*) Having granted the minor leniency by placing him on probation for a DJF-qualifying offense, the court retains discretion to impose a DJF commitment if the minor violates that probation. The availability of that option provides an important incentive for the minor to reform.

2. *Legislative History*

Construed in light of standard principles of interpretation, the meaning of *section 733(c)* is clear, and there is no need to resort to legislative history. (See *Lopez v. Superior Court (2010) 50 Cal.4th 1055, 1063 [116 Cal. Rptr. 3d 330, 239 P.3d 1228].*) We have examined the legislative history underlying *section 733(c)*, however, and found nothing to suggest that the Legislature [*409] intended to deprive juvenile courts of their long-standing discretion to dismiss delinquency petitions when appropriate. [2]

2 At the People's request, we have taken judicial notice of the legislative histories surrounding the enactment of *sections 733* and *782*. At the minor's request, we have also taken judicial notice of legislative history materials concerning a predecessor to the bill that enacted *section 782*. (See *post*, fn. 5.)

Section 733(c) was enacted as part of the 2007 realignment legislation. (*In re N.D. (2008) 167 Cal.App.4th 885, 892 [84 Cal. Rptr. 3d 517]; P.C., supra, 173 Cal.App.4th at pp. 1468-1469.*) The overarching purpose of Senate Bill No. 81 (2007-2008 Reg. Sess.), which added *section 733*, was to make "necessary statutory changes to implement the Budget Act of 2007." (Stats. 2007, ch. 175, § 38, p. 2105.) A report of California's Little Hoover Commission explains the history behind these budgetary measures: "To settle a lawsuit brought on behalf of inmates of state juvenile facilities, the state entered into a consent decree in November of 2004. The cost of compliance with the consent decree proved to be high: 'Realizing the state could not afford to comply with the ... consent decree, in 2007, policy-makers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders ...' (Little Hoover Com., Juvenile Justice Reform: Realigning Responsibilities (July 2008) pp. i-ii <http://www.lhc.ca.gov/lhcdir/192/report 192.pdf> ...)" (*In re N.D., at pp. 891-892.*)

One aspect of Senate Bill No. 81 (2007-2008 Reg. Sess.) was to "stop the intake [to DJF] of youthful offenders adjudicated for non-violent, non-serious offenses (non-*707b* offenses) ... " (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 2.) In the first budget year, this change was projected [**1169] to reduce the average daily population in state juvenile institutions by 199 offenders and the average daily population on parole by 190 parolees. (*Id.* at p. 3.) "By transferring responsibility for some wards to county authorities, the state saved about $ 250,000 per ward per year. [Citation.] At the same time, the legislation compensated the counties for the additional wards for which they would be responsible under a formula based on a rate of $ 117,000 per ward per year. [Citations.]" (*In re N.D., supra, 167 Cal.App.4th at p. 892.*) In addition to these budgetary concerns, this realignment legislation responded to findings [***283] that better results could be obtained at the local level for nonviolent juvenile offenders. An argument in support of Senate Bill No. 81 stated: "Quite simply most counties do it better and for less cost. The offenders that will be diverted are non-serious, non-violent, [*410] non[-]sex offender[] wards who likely can be better served in their communities closer to their existing support systems." (Sen. Republican Fiscal Off., Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended Apr. 19, 2007, p. 2.)

Section 733(c)'s limitation on juvenile offenders eligible for a DJF commitment was "motivated by a desire to reduce the cost and increase the effectiveness of juvenile confinement." (*In re N.D., supra, 167 Cal.App.4th at p. 892.*) The legislative history consistently stresses that only wards who are *not currently violent* will be diverted from state to local responsibility. There is no indication the Legislature ever considered the situation before us, in which an offender who is on probation for a recent serious and violent offense is brought before the juvenile court on a new petition alleging a non-DJF-eligible offense. However, it is clear that the Legislature intended to preserve the possibility of DJF commitments for violent offenders and sex offenders. In keeping with this clear legislative intent, it is not reasonable to interpret the realignment legislation as restricting the juvenile court's ability to order an appropriate disposition for such offenders. Nothing in the legislative history surrounding the enactment of *section 733(c)* suggests the Legislature intended to strip juvenile courts of their long-held discretion to dismiss a delinquency petition when dismissal is in the interests of justice and for the minor's welfare. "We are not persuaded the Legislature would have silently, or at best obscurely, decided so important ... a public policy matter and created a significant departure from the existing law." (*In re Christian S. (1994) 7 Cal.4th 768, 782 [30 Cal. Rptr. 2d 33, 872 P.2d 574].*)

3. *Policy Considerations*

(12) The interpretation we adopt also avoids absurd and unreasonable consequences. [FN13] In interpreting a statute, courts are obligated to "adopt a common sense construction over one leading to mischief or absurdity." (

In re Somano (1993) 31 Cal.App.4th 984, 989 [37 Cal. Rptr. 2d 491].)

The minor complaint that juvenile courts should not be able to circumvent *section 733(c)*'s restrictions on DJF eligibility by using a dismissal to "reach back" to an earlier delinquency petition. But *section 782* can only be used to "reach back" and commit a minor to DJF if the minor is currently on probation for a DJF-eligible offense. Under these circumstances, no one disputes that if the prosecution files a *777* notice alleging a probation violation, the juvenile court can commit the minor to DJF as punishment for the original *section 707(b)* offense. (*See In re D.J., supra, 185 Cal.App.4th at p. 286; J.L., supra, 168 Cal.App.4th at p. 60.*) However, if the prosecution alleges the new offense in a *602* petition instead of a *777* notice, a commitment to DJF is potentially foreclosed because the new *602* petition [*411] becomes the relevant petition for determining the minor's "most recent offense alleged in any petition" for purposes of *section 733(c)*. If the minor admits the non-*707(b)* offense before the prosecution reconsiders its decision, or has a chance to dismiss the *602* petition on its own motion, the plain language of *section 733(c)* prohibits the juvenile court from committing the minor to DJF.

It is evident, then, that the situation we are addressing often arises because the [**1204] prosecution has simply filed the wrong piece of paper: a *602* petition instead of a *777* notice. [**1170] Although not to be encouraged, occasional oversights such as this understandably occur given the unusually short deadlines in juvenile delinquency matters. As discussed, a *602* petition or a *777* notice must be filed within 48 hours after a minor has been into custody, and a detention hearing must be held the next judicial day. (*§§ 631, subd. (a), 632, subds. (a), (c).*) A jurisdictional hearing is required within the next 15 judicial days: (*§ 657, subd. (a)(1).*) These strict deadlines leave the prosecution and probation department very little time to investigate the minor's criminal history before the current allegations are adjudicated or the minor has an opportunity to admit them. A minor can admit the allegations in a *602* petition at the detention hearing, which typically occurs just three days after he has been taken into custody.

Nothing in the language or legislative history of *section 733* suggests the Legislature meant to deprive juvenile courts of the ability to impose DJF commitments when revoking probation for DJF-eligible offenses. Yet, the minor's interpretation would produce exactly that absurd result if the prosecution mistakenly alleges the latest offense in a *602* petition instead of a *777* notice. It would immunize from DJF commitment a minor who quickly admits new misconduct alleged in a *602* petition even if the minor remained eligible for DJF under the terms of probation on a prior offense. Two minors on probation for the same DJF-eligible offense who later committed the same non-*section-707(b)* conduct would be subject to very different dispositions depending on which form of pleading was filed.

[HN14] (13) The statutory scheme governing juvenile delinquency is designed to give the court "maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it." (*In re Antonio D. (2006) 137 Cal.App.4th 1314, 1323 [40 Cal. Rptr. 3d 883].*) Flexibility is the hallmark of juvenile court law, in both delinquency and dependency interventions. (*In re Jones R. (2007) 153 Cal.App.4th 413, 432 [62 Cal. Rptr. 3d 824].*) As noted, the juvenile court has long enjoyed great discretion in the disposition of juvenile matters (*In re W.R.W., supra, 17 Cal. App. 3d at p. 1037*), and that discretion is codified in *section 782*. To interpret *section 733(c)* as cutting off the juvenile court's broad discretion to order an appropriate disposition, simply because [*412] the wrong document was filed, would elevate form over substance and create an absurd result the Legislature could not have intended. When a DJF commitment for a *section 707(b)* offense for which probation was ordered serves the interests of justice and the welfare of the minor, the juvenile court has discretion to dismiss a new *602* petition to permit treatment of the matter as a probation violation.

The dissent agrees that *section 733(c)* does not restrict a juvenile court's power to dismiss a *602* petition before jurisdictional findings have been made. Once an allegation of a non-DJF-eligible offense has been admitted or found, however, the dissent would hold *section 733(c)* strips the court of discretion to dismiss the petition in whole or in part. (Dis. opn., *post*, at p. 423.) But, as noted, a minor can admit allegations of a *602* petition at the detention hearing, which must be held *the next judicial day* after the petition is filed. (*§ 632, subd. (a).*) There is no indication the Legislature intended to limit the juvenile court's dispositional options irrevocably so early in the proceedings. The dissent's interpretation of *section 733(c)* could have [***285] the perverse effect

of discouraging the early resolution of delinquency matters. If, by accepting an admission at the outset of the case, the juvenile court stands to lose its discretion under *section 782*, courts may be loath to accept such early pleas.

The dissent's interpretation could also reward gamesmanship in the context of multicount petitions. If a minor commits a series of criminal offenses and all are alleged in the same *602* petition, there is no argument that *section 733(c)* prohibits commitment to DJF unless the last offense committed is one listed in *section 707(b) or Penal Code section 290.008, subdivision (c)*. Although *section 733(c)* premises eligibility for DJF on the nature of "the most recent offense alleged in any petition," focusing on the most recently committed offense could lead to arbitrary [**1171] and potentially absurd results in a multicount case. A minor who commits a string of violent acts would be immunized from a DJF commitment if the crime spree happened to end with a nonqualifying offense. An arguably more sensible interpretation of *section 733(c)* would require simply that an offense alleged in the *most recent petition*, and admitted or found true, be listed in *section 707(b) or Penal Code section 290.008, subdivision (c)*. [3]

> 3 We need not, and do not, resolve this controversy here. We note, however, that focusing on the most recent petition, and not the most recent offense described in a multicount petition, would appear to avoid absurd consequences and remain consistent with the Legislature's intent to reserve DJF commitments for specific recent offenses.

Assuming that DJF eligibility turns on the nature of a minor's most recently committed offense, the dissent posits that *section 782* gives the court discretion to strike individual counts in a *602* petition to change the "most [*413] recent" offense alleged into one that is DJF eligible. (Dis. opn., *post*, at p. 423, fn. 2.) "Thus, if a minor committed a crime spree that included DJF-eligible offenses, but the offense committed last in time was a DJF-ineligible offense, the juvenile court might, in an appropriate case, dismiss the allegations regarding the last offense in order to clearly preserve a DJF-dispositional option." (*Ibid.*) The dissent therefore recognizes that *section 782* can and sometimes should be used for the purpose of *preserving* the juvenile court's ability to order a DJF commitment. Nevertheless, in the dissent's view, the court's discretion to use *section 782* for this purpose is completely lost once the allegations in a petition have been admitted or found true. A minor could admit *all* allegations of a multicount *602* petition at the detention hearing, just one day after the petition was filed, and completely avoid a DJF commitment regardless of the multitude or severity of the offenses, so long as the last offense committed was not DJF eligible. Under the dissent's view, the juvenile court would be powerless to prevent this result. We disagree. If the Legislature had intended to limit the court's discretion to forestall absurd and unjust consequences, we believe it would have made this intent clear, it did not.

Although the dissent concedes that "nothing in the language of [*section 733(c)*] or its history expressly restricts the court's use of its dismissal authority ... ," the dissent expresses concern that under our interpretation "a juvenile court could always avoid the DJF-ineligibility provisions of *section 733(c)*, negating the provisions of such statute and frustrating the legislative purposes of the juvenile justice realignment legislation." (Dis. opn., *post*, at p. 424.) This [***286] argument ignores the unique context we are addressing. Dismissal of a *602* petition enables the court to order a DJF commitment otherwise prohibited by *section 733(c) only for* a minor *currently* on probation for a DJF-eligible offense. If the minor is not on probation, or is on probation for a nonqualifying offense, a *section 782* dismissal can have no effect on DJF eligibility. *Section 733(c)*'s restrictions on DJF eligibility thus have "meaningful[] operat[ion]" in all delinquency cases involving a minor not on probation, or on probation for a nonqualifying offense. (See dis. opn., *post*, at p. 424.)

The dissent's unease that juvenile courts may abuse *section 782* to circumvent the legislative goal of realignment also ignores the scrutiny such decisions undergo on appellate review. A juvenile court's decision to dismiss a *602* petition under *section 782* must be supported by a statement of "specific reasons" in a minute order. (*Cal. Rules of Court, rule 5.790(a)(2)(A)*; see *In re Juan C. (1993) 20 Cal.App.4th 748, 752-753 [24 Cal. Rptr. 2d 373].*) A *section 782* dismissal is also subject to review for abuse of discretion. (See *In re Jesus J. (1995) 32 Cal.App.4th 1057, 1060 [38 Cal. Rptr. 2d 429].*) If the juvenile court's action is arbitrary, or does not [*414] comport with *section 782*'s requirements that the dismissal serve the interests of justice and the welfare of the minor, it can be reversed on appeal as an abuse of

discretion.

4. Appellate Case Law

Two published appellate decisions have considered the issue before us and reached opposite results.

[**1172] In *J.L., supra, 168 Cal.App.4th 43*, J.L. committed a series of offenses that were adjudicated at various times under *602* petitions and *777* notices. In May 2006, he admitted committing felony theft, unauthorized use of a vehicle, and assault, as alleged in *602* petitions from January and March 2006. (*J.L., at p. 49.*) In December of the same year, another *602* petition was filed, alleging attempted second degree robbery with personal use of a knife. (*J.L., at p. 50.*) The minor admitted these allegations but was later granted permission to withdraw his admission to the weapon enhancement. (*Id. at pp. 50-51.*) Without the enhancement, the attempted robbery offense was not DJF eligible under *section 733(c)*. Recognizing this problem, at the Dispositional hearing the juvenile court dismissed the December *602* petition and ordered J.L. committed to DJF on the March 2006 petition. (*J.L., at pp. 52-54.*) J.L. challenged this order on appeal, arguing *section 733(c)* precluded his commitment to DJF because his most recent offense admitted and found true was the attempted robbery alleged in the December 2006 petition. (*J.L., at p. 56.*) Without analyzing the apparent conflict in the statutes, the Court of Appeal upheld the dispositional order because the juvenile court had dismissed the December 2006 petition under *section 782*, thus making the DJF-eligible offense alleged in the March 2006 petition the "most recent" offense for purposes of *section 733(c)*. (*J.L., at pp. 56-57.*)

The Court of Appeal here rejected *J.L.* in favor of the contrary ruling in *V.C., supra, 173 Cal.App.4th 1453*. Although the decision below relied heavily on the reasoning in *V.C.*, that case is distinguishable and does not guide our analysis.

In 2005, V.C. admitted committing felony oral copulation of a minor, an offense listed in *section 707(b)*. He was placed in a youth facility and later moved to another [***287] placement with special conditions of probation imposed. (*V.C., supra, 173 Cal.App.4th at p. 1459.*) In November 2007, two months after *section 733(c)* was enacted and two years after V.C.'s *602* petition was sustained, the district attorney filed another *602* petition alleging V.C. had committed three new sex offenses. (*V.C., at p. 1460.*) *In a negotiated plea bargain*, V.C. admitted a misdemeanor that was *not* DJF eligible, and the remaining allegations were dismissed. (*Ibid.*) The court again ordered residential treatment, and V.C. was placed accordingly. (*Id. at p. 1466.*) Four [*415] months later, in February 2008, the district attorney filed a *777* notice alleging V.C. had violated probation by failing to participate in sex offender treatment and obey the rules in his group home. (*V.C., at p. 1460.*) At the same time, the district attorney moved to dismiss the November 2007 petition so that, pursuant to *section 733(c)*, the "most recent offense alleged in any petition" would be the 2005 oral copulation offense, which is DJF eligible. (*V.C., at p. 1460.*) After the juvenile court granted the motion, V.C. petitioned for a writ of mandate. (*Id. at p. 1461.*)

The Court of Appeal first observed that V.C. had a "due process right to the benefit of his plea bargain in the 2007 petition." (*V.C., supra, 173 Cal.App.4th at p. 1465.*) It was not just that V.C. had admitted an allegation in the petition; the district attorney had agreed to the resolution, the juvenile court had ordered a disposition, and V.C. had *already entered* the sentence that the court ordered. (*Id. at p. 1466.*) As the Court of Appeal stressed, V.C.'s "plea agreement was thus a *fully executed agreement*." (*Ibid.*, italics added.) The court concluded that dismissal of the November 2007 petition was not in the interests of justice, as required by *section 782*, because V.C. had a constitutional right to the benefit of his completed plea bargain. (*V.C., at p. 1467.*) The court reasoned: "Allowing a trial court to rescind a plea bargain that has been accepted and fully executed, because it was unaware of a change in the law ... , would clearly introduce unacceptable instability to the practice of plea bargaining. No bargain would ever truly be secure." (*Ibid.*)

[**1173] Although the court went on to analyze the language and history of *section 733(c)* to "confirm[]" its conclusion, the decision rested primarily on the fact that dismissal of the most recent *602* petition was an attempt to undo so executed plea bargain. (*V.C., supra, 173 Cal.App.4th at p. 1467.*) It would be difficult indeed to conclude that such an action served the interests of justice. The facts of this case are quite different. Just three days after the minor admitted an offense that was not DJF eligible, the prosecution moved to set aside the plea and dismiss the *602* petition. No disposition on the petition had been entered, or even much discussed. Indeed, the court explained that it was dismissing the *602* petition to broaden the range of options for disposition.

Dismissing a *602* petition *after* disposition potentially raises a host of constitutional concerns not presented in the case before us. We express no opinion on whether such a dismissal could ever be appropriate. However, we disagree with the *V.C.* court's holding that *section 733(c)* must always override the juvenile court's ability to dismiss a delinquency petition under *section 782*. Accordingly, that portion of *V.C. v. Superior Court, supra, 173 Cal.App.4th 1453, 1467-1469*, is disapproved. [*416]

[***288] *C. Scope of Juvenile Court's Discretion Under Section 782*

Apart from *section 733(c)*, the minor contends dismissal of a *602* petition to permit disposition under an earlier petition is not permissible because *section 782* may only be used to terminate jurisdiction. This claim rests on an analogy to *Penal Code section 1385*, the dismissal statute applicable to adult criminal cases, and the legislative history of *section 782*. Both arguments are unpersuasive.

1. Analogy to Penal Code Section 1385

In terms similar to *section 782*, *Penal Code section 1385* grants trial courts the power to dismiss a criminal action "in furtherance of justice." In determining whether a *section 782* dismissal is "in the interests of justice" (*§ 782*), some courts have looked to *Penal Code section 1385* for guidance. (*V.C., supra, 173 Cal.App.4th at p. 1465; Derek L. v. Superior Court, supra, 137 Cal. App. 3d at pp. 233-234.*)

In *V.C.*, the Court of Appeal remarked, "it has been said dismissal pursuant to *[Penal Code] section 1385* 'runs only in the immediate favor of a defendant, i.e., by cutting off an action or a part of an action *against* the defendant.' " (*V.C., supra, 173 Cal.App.4th at pp. 1464-1465, fn. 9*, italics added, quoting *People v. Hernandez (2000) 22 Cal.4th 512, 524 [93 Cal. Rptr. 2d 909, 994 P.2d 354]*.) Having construed *Penal Code section 1385* as a statute that operates only to reduce punishment of a criminal defendant, the *V.C.* majority found it "troubling" that the juvenile court had used its analogous authority under *section 782* to impose a more severe sanction. (*V.C., at pp. 1464-1465, fn. 9.*) The sterling point of this analysis is faulty, however, because we have never held that a dismissal under *Penal Code section 1385* can only be entered to benefit the defendant. Immediately after we stated, in a different context, that a dismissal under *Penal Code section 1385* runs in the immediate favor of a defendant, we added: "To be sure, as the People point out, dismissal under *Penal Code section 1385, subdivision (a)*, need not always be ordered for the benefit of a defendant rather than the prosecution. Thus, a dismissal of criminal charges before trial may be 'designed to enable the prosecution "to obtain further witnesses, to add additional defendants, to plead new facts, or to plead new offenses ... ." ' (*People v. Orin (1975) 13 Cal.3d 937, 946 [120 Cal. Rptr. 65, 533 P.2d 193]*.)" (*People v. Hernandez, at p. 524.*)

(14) The analogy between *section 782* and *Penal Code section 1385* is also flawed for a more fundamental reason. [fN15] "Juvenile proceedings are conducted not only for the protection of society, but for the protection and benefit of the youth involved." (*Derek L. v. Superior Court, supra, 137 Cal. App. 3d at* [*417] *p. 236.*) "Juvenile court action thus differs from adult criminal prosecutions where 'o major goal is corrective [**1174] confinement of the defendant for the protection of society.' [Citation.] The protective goal of the juvenile proceeding is that 'the child [shall] not become a criminal in later years, but a useful member of society.' [Citation.]" (*In re Ricardo M. (1975) 52 Cal. App. 3d 744, 749 [125 Cal. Rptr. 292]*; see *People v. Arias (1996) 13 Cal.4th 92, 164 [51 Cal. Rptr. 2d 770, 913 P.2d 980]*.) In contrast to the more punitive aims of the adult criminal justice system, "the purpose of the juvenile justice system is '(1) to serve the best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and "enable him or her to be a law-abiding and productive member of his or her family and community," [***289] and (2) to "provide for the protection and safety of the public ... ." (*§ 202, subds. (a), (b) & (d)*; [citations].)' [Citation.]" (*In re R.O. (2009) 176 Cal.App.4th 1493, 1500 [98 Cal. Rptr. 3d 738]*.) To this end, the language of *section 782* specifically requires that any dismissal of a delinquency petition serve *both* "the interests of justice *and the welfare of the minor*." (*§ 782*, italics added.) No corresponding concern for the welfare of an adult criminal defendant appears in *Penal Code section 1385*.

[fN16] (15) A DJF commitment is not necessarily contrary to a minor's welfare. The DJF has many rehabilitative programs that can benefit delinquent wards. (*See In re Jonathan T. (2008) 166 Cal.App.4th 474, 483-486 [82 Cal. Rptr. 3d 733]*; *In re Tyrone O. (1989) 209 Cal. App. 3d 145, 153-154 [257 Cal. Rptr. 134]*.)

Some wards, like the minor here, may be best served by the structured institutional environment and special programs available only at the DJF. (See, e.g., *In re Donald S. (1988) 206 Cal. App. 3d 134, 139 [253 Cal. Rptr. 274]* [finding it in child's best interest "to receive care, treatment and rehabilitation solely as a ward of the youth authority [(now DJF)]".) In determining a child's best interests, the juvenile court must examine all the relevant circumstances. (See *In re Roger S. (1992) 4 Cal.App.4th 25, 30-31 [5 Cal. Rptr. 2d 208]* ["Although both the family court and the juvenile court focus on the best interests of the child, the juvenile court has a special responsibility to the child as *parens patriae* and must look at the totality of the child's circumstances."].)

(16) Leaving aside the welfare of the minor, the dissent contends a dismissal that permits a DJF commitment "cannot be in the interests of justice," as required by *section 782*, because "those interests have already" been determined by the Legislature" and expressed in *section 733(c)*. (Dis. opn., *post*, at p. 425.) We conclude instead that [HN17] the realignment policies served by *section 733* are not so unyielding they cannot tolerate occasional exceptions when the severity of a minor's offenses, and the minor's own special needs, call for a disposition that includes DJF. If the Legislature had meant to impose such an absolute prohibition on DJF confinement, it would have removed the court's ability to order a DJF commitment for conviction[*418] probation violations. [4] Moreover, there is no reason to assume juvenile courts will ignore the policies underlying *section 733* when they exercise their discretion to dismiss a *602* petition. In deciding whether a dismissal that would qualify an otherwise ineligible minor for a DJF commitment serves the interests of justice and the minor's welfare, the court must take into account all circumstances relevant to the public's need for safety and the juvenile's need for rehabilitation. Where the minor has previously failed in a series of local programs, or where, as here, no local programs will accept the minor, statewide confinement in the structured setting offered by DJF may decisively outweigh other considerations.

4 Such a result would have been easy enough to accomplish. If *section 733(c)* had been written to require DJF eligibility for the minor's "most recent offense alleged in a petition *or notice*," or if the statute had simply tied eligibility to the minor's "most recent offense," without mentioning the court document in which it is alleged, the juvenile court's ability to send wards to DJF on probation violations would arguably have been greatly restricted.

2. Legislative History of Section 782

In a related point, the minor asserts that legislative history demonstrates *section 782* (***290) was intended to be used only to end the [**1175] juvenile court's jurisdiction *over a minor*. Presiding Justice Scotland expressed this view in his concurring opinion in *W.C., supra, 173 Cal.App.4th at page 1472*. Having reviewed the sparse legislative history for *section 782*, we disagree.

Section 782 was enacted in 1971 with the passage of Senate Bill No. 461 (1971 Reg. Sess.) (Stats. 1971, ch. 607, § 1, p. 1211.) The bill was intended to "codify[] present practice in many counties." (Assem. Com. on Crim. Justice, Analysis of Sen. Bill No. 461 (1971 Reg. Sess.) p. 1.) The bill offered one important new feature, however. Existing law allowed juvenile courts to dismiss petitions and set aside wardship findings only when the minor was under the jurisdiction of the court. (Cal. Youth Authority Com., Enrolled Bill Rep. on Sen. Bill No. 461 (1971 Reg. Sess.) Aug. 10, 1971, p. 1.) An enrolled bill report noted that Senate Bill No. 461 would extend this authority to all cases involving a person under age 21, "regardless of whether the minor is, at the time of dismissal, a ward or dependent of the court." (*Ibid.*) "Some judges have felt that minors have been continued under the jurisdiction of the juvenile court so that the court could take this option of setting aside wardship." (*Ibid.*) The report explained that the bill would give courts latitude "to terminate jurisdiction at an earlier date if the court felt that this was in the best interest of the minor." (*Ibid.*) Consistent with this analysis, the Assembly Committee on Criminal Justice explained that newly enacted *section 782* would allow the juvenile court to "dismiss a petition or set aside a finding even after jurisdiction over the minor has terminated and he is no longer a ward or dependent child of the court." (Assem. Com. on Criminal Justice, New Statutes Affecting the Criminal Law (1971 Reg. Sess.) p. 36.)[*413]

Read carefully, this legislative history does not show that *section 782* was intended to be used for the limited purpose of terminating the juvenile court's jurisdiction. Rather, because *section 782* extended the juvenile court's power to dismiss petitions and set aside findings to minors who were *not presently wards of the court*, legislative analyses observed that the courts would be

free to terminate jurisdiction over minors earlier, without fear of losing this authority.

(17) Although the bill's sponsor described Senate Bill No. 461 (1971 Reg. Sess.) as a measure "authorizing[] the judge of a juvenile court to terminate its jurisdiction" when the interests of justice and welfare of the minor require dismissal (Sen. Joseph Kennick, letter to Governor Ronald Reagan (1971 Reg. Sess.) Aug. 12, 1971, Governor's chaptered bill files, ch. 607), [5] nothing in the language of *section 782* or the legislative history suggests that termination of jurisdiction was the *only* outcome the Legislature found permissible. [HN18] Termination of jurisdiction is one logical outcome to expect when the juvenile court dismisses a delinquency petition. The Legislature did not necessarily foreclose other outcomes when it enacted *section 782*, however. If the minor's view were correct, the juvenile [***291] court could never dismiss a *602* petition, or set aside findings in such a petition, if it would still retain jurisdiction over the minor based on previous petitions. There is no indication the Legislature intended such a result. On the contrary, *section 782* was meant to codify and expand the juvenile court's discretionary dismissal power.

5 The minor directs us to nearly identical comments by Senator Kennick in regard to a predecessor bill that would have added the same version of *section 782*. (Sen. Bill No. 1251 (1970 Reg. Sess.) Apr. 3, 1970.) However, the senator did not say that a dismissal could *only* be used to terminate the court's jurisdiction. In any event, "[w]e have frequently stated ... that the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation." *Quintano v. Mercury Casualty Co. (1995) 11 Cal.4th 1049, 1062 [48 Cal. Rptr. 2d 1, 906 P.2d 1037].*

D. Conclusion

(18) Since its enactment in 1971, *section 782* has given juvenile courts broad discretion to dismiss delinquency petitions when a dismissal serves the interests of justice and the welfare of the minor. Had the Legislature intended to limit that discretion when it enacted *section 733(c)*, one would have expected it to make this intent plain, either in the language [**1176] of *section 733(c)* or elsewhere in the statutory scheme. It did not. Moreover, because the Legislature did not amend the law to prohibit minors from being committed to DJF when their probation on a DJF-eligible offense is revoked, it is reasonable to conclude the Legislature continued to find such commitments appropriate, notwithstanding the goals sought to be served by *section 733(c)*. [DN19] [*420] If a DJF commitment is appropriate in the context of a probation revocation, then it remains appropriate even if the prosecution files a *602* petition first list to be withdrawn or dismissed.

(19) Accordingly, we conclude the juvenile court here had authority to dismiss the *602* petition filed on August 18, 2009. Dismissal of this petition, for the purpose of allowing a DJF commitment on the minor's previously sustained *602* petition, was not precluded by statute, as the Court of Appeal below held. A dismissal for this purpose is appropriate under *section 782* so long as the juvenile court, in its discretion, finds that the dismissal is required by the interests of justice and the welfare of the minor. Because the Court of Appeal determined that the juvenile court lacked authority to dismiss the 2009 petition, it did not reach the minor's claims that insufficient evidence showed he would benefit from a DJF commitment and that the juvenile court erroneously relied on information received outside the proceedings. We shall remand for the Court of Appeal to decide these remaining issues.

III. DISPOSITION

The judgment of the Court of Appeal is reversed. The matter is remanded to that court for further proceedings consistent with this opinion.

Baxter, J., Werdegar, J., and Chin, J., concurred.

DISSENT BY: Cantil-Sakauye

DISSENT

CANTIL-SAKAUYE, C. J., Dissenting.—Despite the Legislature's clear provision in *Welfare and Institutions Code section 733, subdivision (c)* (*section 733(c)*) that a juvenile ward is ineligible for commitment to the "Department of Corrections and Rehabilitation, Division of Juvenile Facilities" (DJF) when the juvenile ward's most recent offense alleged in any petition and admitted or found to be true by the court is not an offense listed in *section 707, subdivision*

(b) (section 707(b)) or one of the sex offenses described in *subdivision (c) of Penal Code section 290.008 (Penal Code section 290.008(c))*, the majority concludes that a juvenile court retains the discretion to commit such a juvenile ward to the DJF by using its authority under *section 782* to dismiss the most recently [***292] sustained petition and reach back to the last sustained petition if the minor is DJF eligible under such petition. (*§ 731, subd. (a)(4).*) I cannot agree. The majority's construction of the statutes does not properly harmonize them, it renders *section 733(c)* ineffective and essentially meaningless. I, therefore, dissent.

1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

It has long been and continues to be the law that when a minor is before the juvenile court for disposition based on a *section 602* petition, "[section] [*421] 725.5 and other relevant policies of Juvenile Court Law require that the court consider 'the broadest range of information' in determining how best to rehabilitate a minor and afford them adequate care ... ." (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2012) Disposition of Ward, § 9.92[3][a], p. 3-133.) The juvenile court must consider "the safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor" in its deliberations regarding disposition. (*§ 202, subd. (b).*) "No ward of the juvenile court shall be committed to the [DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he [or she] will be benefited by the reformatory educational discipline or other treatment provided by the [DJF]." (*§ 734.*) Thus, in all cases a juvenile ward may be committed to the DJF only if such commitment is appropriate under the [**1177] circumstances specific to that individual juvenile offender.

However, in 2007, the Legislature acted to impose further limitations on the discretion of the juvenile court with respect to DJF commitments. Responding to both policy arguments and budgetary constraints (*In re N.D. (2008) 167 Cal.App.4th 885, 891-892 [84 Cal. Rptr. 3d 517]*; Little Hoover Com., Juvenile Justice Reform: Realigning Responsibilities (July 2008) pp. i-ii <http://www.lhc.ca.gov/studies/192/report 192.html> [as of Aug. 27, 2012]), the Legislature passed juvenile justice realignment legislation as part of a budget trailer bill and a subsequent cleanup bill. (Stats. 2007, ch. 175, §§ 19, 22, pp. 2089, 2090; Stats. 2007, ch. 257, § 2, p. 2814.) The legislation expressly restricts the normal dispositional authority of the juvenile court.

Specifically, *section 731, subdivision (a)(4) (section 731(a)(4))* provides that DJF commitments are available for only those juveniles who are or have been ordered and adjudged to be wards of the court under *section 602*. Further, only those juvenile wards who have committed a serious or violent felony offense described in *section 707(b)* or a sexual offense described in *Penal Code section 290.008(c)* are eligible for a DJF commitment. (*§ 731(a)(4).*) And among that class of juvenile offenders, DJF commitment is limited to those juvenile wards whose "most recent offense alleged in any petition and admitted or found to be true by the court" is a serious or violent offense under *section 707(b)* or a sex offense specified in *Penal Code section 290.008(c)*. (*§ 733(c).*) In other words, the statutes do not authorize commitment to the DJF in the unrestricted discretion of the juvenile court based on the court's review of the overall delinquent history of a juvenile offender or on whether the minor still may be considered generally a serious, violent or sexual offender dangerous to the community for whom DJF commitment is appropriate. (*V.C. v. Superior Court (2009) 173 Cal.App.4th 1433, 1468 [93 Cal. Rptr. 3d 851] (V.C.).*) Rather, the statutes limit the pool of juvenile [*422] offenders who may be committed to the DJF to juveniles who are wards of the court based on *current section 707(b)* or *Penal Code section 290.008(c)* offenses.

[***293] The language of *section 733(c)* specifically defines those who are considered to have such a *current* qualifying offense. It provides that a juvenile ward is ineligible for commitment to the DJF when "the most recent offense alleged in any petition and admitted or found to be true by the court" is not one of the DJF-qualifying offenses. (*Ibid.*) As the majority recognizes (maj. opn., *ante*, at p. 404), the phrase "the most recent *offense* alleged in any *petition*" (italics added) logically refers to the allegations of violation pled in a *section 602* petition. (*In re M.B. (2009) 174 Cal.App.4th 1472, 1477-1478 [95 Cal. Rptr. 3d 359]*; *In re J.L. (2008) 168 Cal.App.4th 43, 60 [85 Cal. Rptr. 3d 33]*; see *In re D.J. (2010) 185 Cal.App.4th 278, 286 [110 Cal. Rptr. 3d 261]*.) The phrase "admitted or found to be true by the court" is most reasonably understood to refer

to the juvenile court's jurisdictional findings. (*§ 733(c)*; see *§§ 657, subd. (b), 701, 702*; *Cal. Rules of Court, rules 5.774(e), 5.778, 5.780(e)(3).*) Read with this understanding, eligibility/ineligibility for DJF commitment under *section 733(c)* is determined when a minor has admitted committing a criminal offense alleged in a *section 602* petition at his or her detention hearing or later, or when the allegation of a criminal offense in a *section 602* petition is found true by the juvenile court at the jurisdictional hearing, i.e., when the *section 602* petition is sustained. It is at that point that the juvenile court has taken jurisdiction over the minor based on the commission of the criminal offense as charged in the petition and that offense becomes the minor's "most recent offense" for purposes of *section 733(c)*. If that most recent offense does not make the minor ineligible for a DJF commitment under *section 733(c)* and the minor is eligible for commitment to the DJF under *section 731(a)(4)*, then the juvenile court may exercise its discretion at disposition to adjudge the minor to be a ward of the court, or to continue wardship for a minor who has previously been adjudged a ward of the court and commit the ward to the DJF.

Construing the combination of *section 731(a)(4)* and *section 733(c)* in this way furthers [**1178] the legislative purposes of reducing the number of juvenile offenders committed to costly state-level facilities and keeping all but the most dangerous offenders in appropriate and effective local placements. (*In re N.D., supra, 167 Cal.App.4th at pp. 891-892*; Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 2; Assem. Floor Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 1; see *§ 1960* ["The Legislature finds and declares that local youthful offender justice programs, including both custodial and noncustodial corrective services, are better suited to provide rehabilitative services for certain youthful offenders than state-operated facilities. Local communities are better [*423] able than the state to provide these offenders with the programs they require, in closer proximity to their families and communities ... ."].) Requiring DJF commitments to be based on "the" (*§ 733(c)*), not "a," most recently sustained juvenile petition also encourages, promotes, and rewards a juvenile ward's improvement in behavior even though the juvenile may not have been completely successful in reforming his or her conduct.

In situations where the prosecutor views the juvenile's most recent offense to demonstrate not rehabilitative progress, but a continuation of prior serious behavioral problems for which the juvenile is on probation under a DJF-eligible sustained petition, the prosecutor can file a notice of [***294] probation violation under *section 777*. A notice of probation violation does not trigger the terms of *section 733(c)*. (*In re M.B., supra, 174 Cal.App.4th at pp. 1474-1475.*) Nor does a violation of probation proceeding improperly circumvent *section 733(c)*. Rather, the Legislature's election to exclude probation violations that factually involve the commission of DJF-ineligible offenses from *section 733(c)* reasonably recognizes that in such situations the juvenile court may order a commitment to the DJF based on the prior sustained eligible offense, with the maximum term of confinement correspondingly limited by that offense. (*John L. v. Superior Court (2004) 33 Cal.4th 158, 165 [14 Cal. Rptr. 3d 261, 91 P.3d 203].*) Where an extension of the juvenile court's jurisdiction is appropriate, for example, to allow further services and monitoring, a new petition is necessary. The prosecutorial discretion to proceed by either *section 777* notice or the filing of a new *section 602* petition permits a flexible approach to the individual juvenile's situation and preserves the incentive for a juvenile on probation for a DJF-qualifying offense to reform. (See maj. opn., *ante*, at p. 408.)

Moreover, where a prosecutor files a *section 602* petition alleging a new offense or offenses, but subsequently either the prosecutor or the juvenile court concludes the minor's history demonstrates that proceeding by way of a notice of probation violation is more appropriate and in the best interests of the minor, dismissal of the new *section 602* petition, in whole or in part, pursuant to *section 782*, is not prohibited by *section 733(c)*—provided the dismissal is ordered prior to entry of jurisdictional findings on the new petition. [2] Until the allegations of the new petition have been admitted or found true, the restrictions of *section 733(c)* are not triggered.

2 Such dismissal discretion would extend to the possible striking of individual counts alleging DJF-ineligible offenses. Thus, if a minor committed a crime spree that included DJF-eligible offenses, but the offense committed last in time was a DJF-ineligible offense, the juvenile court might, in an appropriate case,

dismiss the allegations regarding the last offense in order to clearly preserve a DJF-dispositional option.

I cannot agree, however, with the majority that *section 782* is available after the juvenile court enters jurisdictional findings sustaining a new *section* [*424] *602* petition alleging a DJF-ineligible offense. Although there is no reference in *section 733(c)*, or its legislative history, to *section 782* and nothing in the language of the statute or its history expressly restricts the court's use of its dismissal authority in this situation, such restriction is necessarily and plainly implied. [7] Otherwise, a [**1179] juvenile [***295] court could always avoid the DJF-ineligibility provisions of *section 733(c)*, negating the provisions of such statute and frustrating the legislative purposes of the juvenile justice realignment legislation.

3 *Section 782* differs from *Penal Code section 1385* in that *section 782* requires a dismissal to be both in "the interests of justice" and that "the welfare of the minor require[s] such dismissal ..." or "that the minor is not in need of treatment or rehabilitation." Nevertheless, with respect to its status as statutory authorization for dismissals and its requirement that a dismissal must be "in furtherance of justice," case law regarding *Penal Code section 1385* may provide useful insight. (See *Y.C., supra, 173 Cal.App.4th at p. 1464*; accord, *In re Juan C. (1993) 20 Cal.App.4th 748, 753 [24 Cal. Rptr. 2d 573]*; *Derek L. v. Superior Court (1982) 137 Cal. App. 3d 228, 233 [186 Cal. Rptr. 870]*.) Such case law makes it clear that the judicial authority to dismiss a case or strike a sentencing allegation under *Penal Code section 1385* may be eliminated by the Legislature even without so express reference to *section 1385* if there is a clear legislative direction to that effect. (*People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 518-519 [53 Cal. Rptr. 2d 789, 917 P.2d 628]*; *People v. Thomas (1992) 4 Cal.4th 206, 211 [14 Cal. Rptr. 2d 174, 841 P.2d 159]*; *People v. Tanner (1979) 24 Cal.3d 514, 519 [156 Cal. Rptr. 450, 596 P.2d 328]*.) The same principle should be applicable to *section 782*.

That is, in the situation where the juvenile court would conclude, based on all the information before it, that a DJF commitment should *not* be ordered for a juvenile offender, it would be unnecessary for *section 733(c)* to provide that DJF commitment is not permitted. *Section 733(c)* meaningfully operates only in the circumstance where the juvenile court would otherwise be inclined to order a DJF commitment. If, however, the juvenile court has the discretion to dismiss the most recently sustained petition under *section 782* whenever it believes a DJF commitment is appropriate and can be reached by proceeding on a *section 777* notice of probation violation, the very specific language in *section 733(c)* restricting eligibility to "the most recent" sustained petition offense is illusory: The majority's interpretation of the statutes to allow such dismissals violates the fundamental rule of statutory interpretation that presumes every part of a statute has some meaning and effect, as well as the corollary rule requiring us to avoid, if possible, a construction that renders statutory language surplusage. (*People v. Arias (2008) 45 Cal.4th 169, 180 [85 Cal. Rptr. 3d 1, 195 P.3d 1031]*.)

At a minimum, the majority's construction of the statutes rewrites *section 733(c)* to allow a juvenile court to order a DJF commitment if it finds the juvenile offender has committed and is on probation for "a" recent DJF-qualifying offense. This violates the principle of statutory construction that precludes us from adding or altering statutory language "to accomplish a [*425] purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden (1992) 2 Cal.4th 556, 562 [7 Cal. Rptr. 2d 531, 828 P.2d 672]*.)

Moreover, I believe use of *section 782* in this case is inappropriate for an additional reason. *Section 782* authorizes a dismissal if it is in the interests of justice *and* required for the welfare of the minor. Both are required and a dismissal is unauthorized if either prong is not met. Through *section 731(a)(4)* and *733(c)*, the Legislature has determined that the public protection and safety interests of society and the rehabilitative interest of juvenile offenders is best balanced by placement of nonserious or nonviolent juvenile offenders, or those whose offense is nonsexual, at the local level and that a state-level DJF commitment should be reserved for those juvenile offenders who have been currently adjudicated to be serious or violent, or are certain sexual offenders. The use of *section 782* to evade the plain meaning of the restriction in *section 733(c)* cannot be in the interests of justice as those interests have already been determined by the Legislature. (*Y.C., supra, 173 Cal.App.4th at p. 1468.*) A dismissal in such a situation must be considered

unauthorized under *section 782*, which requires a dismissal to be *both* in the interests of justice and required for the welfare of the juvenile.

Nevertheless, the majority concludes that the Legislature intended to retain a juvenile court's authority under *section 782* to dismiss a *section 602* petition even in the narrow situation governed by *section 733(c)*. The majority reasons that such traditional discretion must be preserved to accommodate the narrow time constraints governing juvenile delinquency proceedings, which can hinder [**1180] informed prosecutorial choices and inappropriately immunize from a DJF commitment a juvenile who [***296] quickly admits at his or her detention hearing a new petition containing a DJF-ineligible offense after an earlier sustained petition made him or her DJF eligible. Again, I cannot agree. The statutory timelines for investigating, filing, hearing, and ruling on a juvenile's alleged commission of a criminal offense are not so short as to create absurd results under a strict construction of *section 733(c)*. Ours must simply be taken up front to consider what is most appropriate for each minor; care that is already presumed in the statutory scheme for juvenile delinquency wardship proceedings.

Specifically, probation officers already have a statutory duty to "immediately" investigate the circumstances of a juvenile who is detained based on allegations of the commission of a criminal offense. (*§ 628, subd. (a)*.) Such investigation logically must include a review of the juvenile's history of juvenile court proceedings in order for the probation officer to properly decide whether or not to send an affidavit to the prosecuting attorney recommending commencement of *section 602* proceedings. (*§§ 632, 633.5,* [*426] *subds. (b) & (c)*.) And before filing a *section 602* petition alleging a felony offense or as soon as possible after filing, the prosecuting attorney must also review the minor's file to determine if the minor is eligible for deferred entry of judgment under *section 790*. (*§§ 628, subd. (a), 790, subd. (b); Cal. Rules of Court, rule 5.800(b)*.) Because a determination of eligibility for deferred entry of judgment depends, in part, on the minor's history of juvenile court proceedings (*§ 790, subd. (a)*), a prosecuting attorney undertaking such investigation will presumably uncover at the same time the information necessary to determine the minor's DJF eligibility. Thus, the statutory scheme contemplates an informed decision by a probation officer and a prosecuting attorney to pursue the matter by filing a *section 602* petition or by filing a notice of probation violation pursuant to *section 777*.

Moreover, although *section 657, subdivision (b)*, provides that a minor "may" admit the allegations of a *section 602* petition at his or her detention hearing, I am unaware of any authority requiring the juvenile court to accept a proffered admission at that time, particularly in a situation in which the prosecuting attorney or probation officer informs the court that further investigation is necessary. The juvenile court may put over consideration of the acceptance of the minor's admission until the jurisdictional hearing, which must be set within 15 judicial days from the date of the detention order. (*§ 657, subd. (a)(1)*.) And, nothing prevents the court from inquiring of the minor and his or her counsel whether the minor has previously committed a DJF-eligible offense in order for the court to consider the best resolution of the matter.

Thus, it is reasonable to assume that by the time a minor has admitted or been found by the court to have committed a criminal offense alleged in a *section 602* petition, it has been determined by the probation officer, the prosecuting attorney and the juvenile court that it is appropriate for the court to exercise or continue jurisdiction over the minor based on the currently alleged offense or offenses with the concomitant restriction of potential dispositional options.

With guidance from this court regarding the consequences of mistakenly filing and sustaining a new *section 602* petition that alleges DJF-ineligible offenses, probation officers and prosecuting attorneys in the future would be more careful to fully investigate a juvenile's record and not to file a new *section 602* petition alleging DJF-ineligible offenses in situations where the minor is DJF eligible under an earlier [***297] sustained petition and where a DJF commitment may be recommended. The probation officer and prosecuting attorney would be more careful to alert the juvenile court to the minor's history of juvenile court proceedings and the court would be more cautious in accepting admission of the jurisdictional allegations of a new *section 602* [*427] petition alleging DJF-ineligible offenses. Careful prosecutorial investigation and an occasional delay in jurisdictional hearings within the statutorily allotted time to accommodate such investigation would not discourage early resolution of delinquency matters. (See maj. opn., *ante*, at p. 412.) [**1181] It would discourage only

careful filings and inappropriate haste in some small number of proceedings. In my event, the residual possibility of a prosecutorial mistake does not justify ignoring the plain language of *section 733(c)*.

The 2007 legislation, of which *sections 731(a)(4)* and *733(c)* are a part, represents a fundamental shift in policy by the Legislature from treating juvenile offenders at the state level (DJF) to treating the vast majority of juvenile offenders at the local county level. Given the very specific language chosen by the Legislature in *section 733(c)*, I continue to believe an interpretation that limits the juvenile court's discretion better aligns with the Legislature's preference for local commitments. I would apply *sections 731(a)(4)* and *733(c)* according to their plain terms. I would harmonize *section 782* with these statutes by recognizing that juvenile courts continue to have broad discretion to use their dismissal authority under *section 782 except* they may not use *section 782* to make a minor who is ineligible for a DJF commitment under *section 733(c)* eligible for such commitment. I would affirm the judgment of the Court of Appeal that concluded the juvenile court's dismissal here was statutorily unauthorized.

Kennard, J., and Liu, J., concurred.

Appellant's petition for a rehearing was denied October 31, 2012. Kennard, J., was of the opinion that the petition should be granted.

LexisNexis®

NEW YORK TIMES COMPANY, Petitioner, v. THE SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent; GOLETA WATER DISTRICT, Real Party in Interest

No. B045565

Court of Appeal of California, Second Appellate District, Division Six

218 Cal. App. 3d 1573; 268 Cal. Rptr. 21; 1990 Cal. App. LEXIS 283; 17 Media L. Rep. 1773

March 23, 1990

DISPOSITION: [***1] Respondent superior court's order of October 6, 1989, denying the motion to disclose public records is annulled and the matter is remanded to the superior court to issue a new order granting petitioner's motion.

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Freedom of Information > General Overview
Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
[HN1] *Cal. Gov't. Code § 6258* provides that anyone may institute proceedings for injunctive or declaratory relief to enforce the right to inspect or to receive a copy of any public record.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Civil Procedure > Remedies > Writs > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
[HN2] Under Cal. Civ. Proc. Code § 6259, an order directing or refusing disclosure is reviewable only by extraordinary writ of review as defined in *§ 1067*. Grant of writ of review or certiorari under *§ 1067* is limited only to those cases in which a trial court has exceeded its jurisdiction. *§§ 1068, 1074*. Where a court conscientiously follows the law but reaches an arguably incorrect conclusion within the exercise of its jurisdiction, there is no basis for annulling its decision by writ of review.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Civil Procedure > Remedies > Writs > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
[HN3] If the trial court acts contrary to the statutorily authorized procedure, such as that set forth in *Cal. Gov't. Code § 6255*, it acts in excess of its jurisdiction and a writ or review, or certiorari, will lie. *Section 6255* requires the trial court to weigh the public interest served by nondisclosure against the public interest served by disclosure and determine which interest outweighs the other. The agency seeking to withhold the information has the burden of demonstrating a need for nondisclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview

218 Cal. App. 3d 1579, *; 268 Cal. Rptr. 21, **;
1990 Cal. App. LEXIS 382, ***1; 17 Media L. Rep. 1773

[HN4] *Cal. Gov't. Code § 6255* permits the governmental agency to withhold records if it can demonstrate that on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. Thus the burden is on the agency to justify the need for nondisclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview

[HN5] In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A newspaper brought an action under the California Public Records Act (*Gov. Code, § 6250 et seq.*) seeking access to the names and addresses of a water district's customers who exceeded their water allocation after implementation of a water rationing ordinance. The newspaper sought a court order that the district disclose the names and addresses of all customers exceeding their allocation during the first period after implementation of the ordinance. The district agreed to provide the names of commercial, agricultural, and multifamily users but not the names and addresses of individual residential customers. The newspaper moved to compel disclosure of the names and addresses of all customers. The superior court placed the burden on the newspaper to justify the public's right to know the names of individual persons and their addresses; it denied the newspaper's motion to compel and ordered disclosure only of the information already provided to the newspaper. The newspaper petitioned for a writ of review.

The Court of Appeal annulled the superior court's order denying the motion to disclose public records and remanded the matter to the superior court to issue a new order granting the newspaper's motion. The court held that the superior court exceeded its jurisdiction in failing to follow the directive of *Gov. Code, § 6255*, to place the burden on the district to justify withholding the information sought, a burden that the district could not meet. The district did not establish that the narrow privacy rights invaded were so fundamental that they outweighed the public's fundamental and necessary right to be informed concerning the workings of its government. (Opinion by Stone (S. J.), P. J., with Gilbert and Abbe, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Records and Recording Laws § 12.5--Inspection of Public Records--Names and Addresses of Water District Customers Exceeding Water Allocation--Review of Order Denying Disclosure. --The superior court, in placing the burden on a newspaper to give reasons why the court should not limit the newspaper's access to the names and addresses of a water district's customers who exceeded their water allocation, and inferring on the basis of mere speculation the possibility of harassment of and danger to customers as a result of such access, exceeded its jurisdiction, and thus its order denying access was reviewable by extraordinary writ of review. Where a court conscientiously follows the law but reaches an arguably incorrect conclusion within the exercise of its jurisdiction, there is no basis for annulling its decision by writ of review. However, if the court acts contrary to the statutorily authorized procedure, such as that set forth in *Gov. Code, § 6255* (withholding of public records from inspection), it acts in excess of its jurisdiction and a writ or review, or certiorari, will lie.

(2) Records and Recording Laws § 12--Inspection of Public Records--Inspection Right as Balanced Against Privacy Right. --*Cal. Const., art. I, § 1*, guarantees all persons the inalienable right to privacy. Nonetheless, the public and the press have a right to review the government's conduct of its business. The Legislature, mindful of the right of individuals to privacy, has decreed the public's right of access to information concerning the conduct of public business a fundamental and necessary interest of citizenship. Consequently, in enacting the California Public Records Act (*Gov. Code, § 6250 et seq.*), the Legislature balanced the individual's privacy interest with the right to know about the conduct of public business. The specific exemptions from this general requirement of disclosure, which are listed in *Gov. Code, § 6254*, are construed narrowly to insure maximum disclosure of the conduct of governmental

218 Cal. App. 3d 1579, *; 268 Cal. Rptr. 21, **;
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operations.

(3) Records and Recording Laws § 12--Inspection of Public Records--Agency's Burden of Justifying Nondisclosure. --Under *Gov. Code, § 6255* (withholding of public records from inspection), the burden is on the agency to justify the need for nondisclosure.

(4) Records and Recording Laws § 12.5--Inspection of Public Records--Names and Addresses of Water District Customers Exceeding Water Allocation. --In an action under the California Public Records Act (*Gov. Code, § 6250 et seq.*) by a newspaper seeking access to the names and addresses of a water district's customers who exceeded their water allocation after implementation of a water rationing ordinance, the trial court exceeded its jurisdiction in failing to follow the directive of *Gov. Code, § 6255*, to place the burden on the district to justify withholding the information sought, a burden that the district could not meet. The district asserted that publication of the information could expose customers to verbal or physical harassment. However, a mere assertion of possible endangerment does not clearly outweigh the public interest in access to public records. The information sought was public records, the class of information sought was not contained among the subsections of the act listing exemptions from the general disclosure requirement (*Gov. Code, § 6254*), nor did the district establish that the narrow privacy rights invaded were so fundamental that they outweighed the public's fundamental and necessary right to be informed concerning the workings of its government. The preservation of water resources is a matter of great concern, and it is the policy of the state to foster the beneficial use of water and discourage waste.

COUNSEL: Price, Postel & Parma, C. Michael Cooney and David K. Hughes for Petitioner.

No appearance for Respondent.

Wayne K. Lemieux, Dorothy Lou Crisp, Robert E. Goodwin and Russell Ruis for Real Party in Interest.

JUDGES: Opinion by Stone (S. J.), P. J., with Gilbert and Abbe, JJ., concurring.

OPINION BY: STONE

OPINION

[*1581] [**22] Does a newspaper have the right to the names and addresses of a water district's customers who exceeded their water allocation after implementation of a water rationing ordinance? We conclude that the mere assertion by the water district of possible harassment or physical endangerment does not "clearly outweigh" the public interest in disclosure of these records. We further [***2] conclude that the superior court, in denying [*1582] the newspaper access to the water district's list of excessive water users, exceeded its jurisdiction in failing to place the burden to justify nondisclosure of these records on the water district, and shall annul its order.

Procedural Background

As a result [***3] of a severe and protracted water shortage, the Goleta Water District (District) adopted ordinance 89-1, effective May 1, 1989, prohibiting certain uses of water and imposing limitations upon the amount of water which customers may receive from the District. Methods of enforcement include imposition of a surcharge of four times the highest billing rate for excessive use in the first and second billing periods, ten times the highest billing rate for the third and fourth periods of excessive use, imposition of a flow restrictor after the third consecutive billing period of excessive use, and ultimately, the draconian measure of termination (of water service, not the customer). The ordinance also permits a customer's account to be credited for any account of surcharge payments if total water usage during the 12-month period from May 1, 1989, to May 1, 1990, is equal to or less than the total allowed usage for that 12-month period.

Petitioner, a newspaper, sought, under the California Public Records Act (*Gov. Code, § 6250 et seq.*),[1] a court order that the District disclose the names and addresses of those customers who exceeded their water allocation during the first period after implementation [***4] of the ordinance. Petitioner contended that public disclosure -- and resultant embarrassment -- would provide undesirable incentive to comply with the ordinance and the public would be better able to monitor the District's enforcement policies. The District claimed that such information would intrude upon its customers' constitutional right of privacy and that any legitimate purpose for disclosure would be outweighed by the harm that would be visited upon the customers. The District agreed, however, to provide the names of commercial, agricultural, and

multifamily users that had exceeded water allocations, as well as account numbers, amount of excess use, and penalties imposed upon individual residential customers. The District refused to disclose the names and addresses of the individual residential customers.

1 All statutory references are to the Government Code unless otherwise indicated.

Petitioner moved to compel disclosure of the names and addresses of all customers as constituting public records as defined [***4] in section 6252, subdivision (d). 2 The District argued that petitioner's request was premature since the ordinance was only recently implemented. Additionally, it pointed out that since water usage is seasonal, a customer might well use more water in [*1583] the hot months and be above allocation, but conserve in the cooler months and not use more than the yearly allocation at the end of the 12-month period. The court placed the burden on petitioner to justify the public's right, or need, to know the particular names of individual persons and their addresses, as opposed to statistical information concerning excess use, until such time that the customer becomes a chronic water abuser and subject to imposition of a flow restrictor. 3

2 [HN1] *Section 6258* provides that anyone may institute proceedings for injunctive or declaratory relief to enforce the right to inspect or to receive a copy of any public record.

3 Under the ordinance, a customer facing imposition of a flow restrictor has a right to a public hearing.

[***5] The court stated it could take judicial notice of the amount of litigation concerning water use in Goleta and of the drought condition. It was also aware of the passionate feelings in the community concerning water use, and feared that disclosure of customers' identities would not only subject them to embarrassment, but verbal and possibly physical assault. The court denied the motion to compel disclosure of the names and addresses of individuals and ordered disclosure only of the information already provided to petitioner, including the [**24] amount of water used by customers that had exceeded their allotments.

Petitioner now seeks a writ of review. (§ 6259, subd. (c).) It asserts that the information sought is not sensitive, and that there is a public interest in opening to inspection the names of the District's wayward customers. (See *Brown v. City of Tryf (1984) 154 Cal.App.3d 332, 345 [201 Cal.Rptr. 654]; San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 774 [192 Cal.Rptr. 415].*) Further, petitioner argues that the District's assertion of possible harassment is speculative, and does not "clearly [***6] outweigh" the public interest in having access to this information. (*CBS, Inc. v. Block (1986) 42 Cal.3d 646, 652 [230 Cal.Rptr. 362, 725 P.2d 470].*) We agree.

Discussion

1. *Standard of Review*

(1) Petitioner asserts that the court, in making its order, exercised its jurisdiction. [HN2] An order directing or refusing disclosure is reviewable only by extraordinary writ of review as defined in *Code of Civil Procedure section 1067.* (§ 6259.) Grant of writ of review or certiorari (*Code Civ. Proc., § 1067*) is limited only to those cases in which a trial court has exceeded its jurisdiction. (*Code Civ. Proc., §§ 1068, 1074; Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal.App.3d 1102, 1108-1109 [231 Cal.Rptr. 189].*) Where a court conscientiously follows the law but reaches an arguably incorrect conclusion within the exercise of its jurisdiction, there is no [*1584] basis for annulling its decision by writ of review. (*Freedom Newspapers, supra, at p. 1109.*)

However, [HN3] if the court acts contrary to the statutorily authorized procedure, such as that set forth in *section* [***7] *6253*, it acts in excess of its jurisdiction and a writ or review, or certiorari, will lie. (See *Rodmon v. Superior Court (1939) 13 Cal.2d 262, 269 [89 P.2d 109]; Tsukamu v. Small Claims Court (1973) 33 Cal.App.3d 398, 402-403 [123 Cal.Rptr. 883].*) *Section 6255* requires the trial court to weigh the public interest served by nondisclosure against the public interest served by disclosure and determine which interest outweighs the other. (See *CBS v. Block, supra, 42 Cal.3d at p. 652.*) The agency seeking to withhold the information has the burden of demonstrating a need for nondisclosure. (*§ 6255; Braun v. City of Taft, supra, 154 Cal.App.3d at p. 345.*)

Instead, the trial court here placed the onus on the petitioner to give reasons why the court should not limit the amount of access. Additionally, the "evidence" from which the lower court inferred public harassment and

danger was mere speculation. Since the trial court did not follow the governing statute, it exceeded its jurisdiction.

2. *Burden of Proof and Balancing Interests*

[***8] (2) *Article I, section 1, of the California Constitution* guarantees all persons the inalienable right to privacy. (*Scull v. Superior Court (1988) 206 Cal.App.3d 784, 790 [254 Cal.Rptr. 34]; Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 262 [173 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118]; City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 130 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219].*) Disclosure of the information petitioner seeks, however noble the intention, intrudes upon the privacy interest of the District's customers. Nonetheless, the public and the press have a right to review the government's conduct of its business. (*CBS, Inc. v. Block, supra, 42 Cal.3d at p. 654.*) The Legislature, mindful of the right of individuals to privacy, has deemed the public's right of access to information concerning the conduct of public business a fundamental and necessary interest of citizenship. (*Id., at p. 651, fns. 5 & 6; [***9] § 6250.*) "The interest of society in ensuring accountability is particularly strong where the discretion invested in a government official is unfettered, and only a select few are granted the special privilege." [**25] (*CBS, Inc., supra, at p. 653.*)

Consequently, in enacting the Public Records Act, the Legislature balanced the individual's privacy interest with the right to know about the conduct of public business. (*City of Santa Rosa v. Press Democrat (1986) [*1585] 187 Cal.App.3d 1315, 1319 [232 Cal.Rptr. 443].*) Specific exemptions from this general requirement of disclosure are listed in *section 6254* and are construed narrowly to ensure maximum disclosure of the conduct of governmental operations. (*Id., at pp. 1320-1321; San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at pp. 772-773.*)

In addition to these express exceptions, [HN4] *section 6255* permits the governmental agency to withhold records if it can demonstrate that "on the facts of a particular case the public interest served by not making the record public *clearly* outweighs" [***10] the public interest served by disclosure of the record." (*CBS, Inc. v. Block, supra, 42 Cal.3d at p. 652*, fn. omitted, italics in original; *San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at p. 780.*) (3) Thus the burden is on the agency to justify the need for nondisclosure. (*San Gabriel Tribune, supra, at p. 780.*)

3. *To Disclose or Not to Disclose*

(4) Petitioner asserts that the information sought is located in public records open to public inspection (§§ 6252, 6253) and that the claim of privacy of the names of users of excessive water resources is outweighed by the public's "fundamental and necessary right" to be informed concerning the workings of its government. (*§ 6250; CBS, Inc. v. Block, supra, 42 Cal.3d at p. 651.*) In particular, petitioner is concerned about discriminatory enforcement of the ordinance.

The District asserts that publication of those names could expose the individuals to verbal or physical harassment due to the strong currents of emotion on the subject of water overuse, and not simply [***11] encourage, through public embarrassment, those individuals to husband their water usage. Additionally, it argues, customers apply for water as a matter of necessity, not choice. Most residents have no alternate sources of water. (Compare *CBS, Inc. v. Block, supra, 42 Cal.3d at p. 654*, where the court stated that those voluntarily applying for the privilege of carrying a handgun could not prevent disclosure of their identities.)

Nonetheless, "[a] mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records." (*CBS, Inc. v. Block, supra, 42 Cal.3d at p. 652.*) The District should not be allowed to exercise absolute discretion, shielded from public accountability, in deciding which customer is a chronic water abuser. "[HN5] In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*Id., at p. 651*, fn. omitted.) Disclosure of all who exceed their allocation [***12] will ensure that certain individuals do not receive special [*1586] privileges from the District, or alternatively, are not subject to discriminatory treatment.

The records sought are public records and, in the absence of a privilege or a compelling countervailing interest, "are open to inspection at all times . . . " (§ 6253, subd. (a); *CBS, Inc. v. Block, supra, 42 Cal.3d at pp. 651-652; Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 650 [117 Cal.Rptr. 106].*) Significantly, the class of information sought is not contained among

the subsections that list exemptions from the general disclosure requirement. (*§ 6254.*) Nor has the District established that the narrow privacy rights invoked are so fundamental that they outweigh the public's "fundamental and necessary right" to be informed concerning the workings of its government. (*§ 6250; CBS, Inc. v. Block, supra, 42 Cal.3d at p. 651.*) Even given the [***26] strong concerns about water conservation, the record contains no evidence that revelation of names and addresses of those who have exceeded their [***13] water allocation during a billing period will subject those individuals to infamy, opprobrium, or physical assault. [4]

4 We cite the recent, well-reasoned opinion of *Times Mirror Co. v. Superior Court (1990) 217 Cal.App.3d 360 [265 Cal.Rptr. 844]*, in which the reviewing court held that the Governor's schedules and appointment calendars were subject to disclosure under the California Public Records Act absent an evidentiary showing of legitimate safety concerns.

The preservation of water resources has long been a matter of great concern in California. (*National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 443 [189 Cal.Rptr. 346, 658 P.2d 709].*) It is the policy of the state to foster the beneficial use of water and discourage waste. (See *Wright v. Goleta Water Dist. (1985) 174 Cal.App.3d 74, 84 [219 Cal.Rptr. 740]; Cal. Const., art. X, § 2.*) The rapid population growth in certain portions [***14] of Southern California has exceeded available water resources in the region. Recent years have witnessed a severe drought and water resources in Goleta have thereby been further reduced.

The District asserts that the overdrafting of one's water allocation for a month's period does not necessarily demonstrate noncompliance on the part of the customers. Nonetheless, publication of overdrafting by customers during a given period will discourage profligate use of water during the ensuing months and encourage customers to bring their consumption within the guidelines of the ordinance.

Conclusion

The District's fear that outraged citizens will misunderstand the information sought is speculative and does not outweigh the public's right to be informed of the District's implementation of the ordinance. We find that [*1587] respondent superior court exceeded its jurisdiction in failing to follow the statutory directive to place the burden on the agency to justify withholding the information sought, a burden that, on the record, the District could not meet.

Respondent superior court's order of October 6, 1989, denying the motion to disclose public records is annulled and the matter is [***15] remanded to the superior court to issue a new order granting petitioner's motion.

LexisNexis®

CITY OF SAN JOSE, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; SAN JOSE MERCURY NEWS, INC., Real Party in Interest.

No. H019262.

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

74 Cal. App. 4th 1062; 88 Cal. Rptr. 2d 552; 1999 Cal. App. LEXIS 822; 99 Cal. Daily Op. Service 7470; 99 Daily Journal DAR 9407

September 8, 1999, Decided

SUBSEQUENT HISTORY: [***1] Review Denied December 1, 1999, Reported at: *1999 Cal. LEXIS 8606.*

PRIOR HISTORY: Santa Clara County Superior Court. Super. Ct. No. CV773524. The Honorable Jamie Jacobs-May, Trial Judge.

DISPOSITION: Let a peremptory writ of mandate issue directing respondent court to vacate its amended order and judgment of September 24, 1998, and to enter a new and different order denying the San Jose Mercury News's petition for writ of mandate. Each party is to bear its own costs in this original proceeding.

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Freedom of Information > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
Transportation Law > Air Transportation > Noise Control
[HN1] Pursuant to *Cal. Gov't Code § 6259(c)*, an order of the trial court under the California Public Records Act, *Cal. Gov't Code § 6250 et seq.*, which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. The standard for review of the order is an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN2] See *Cal. Gov't Code § 6250.*

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN3] Disclosure of public records has the potential to impact individual privacy. The California Public Records Act, *Cal. Gov't Code § 6250 et seq.* defines "public records" broadly to include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. § 6252. Public records can include personal details about private citizens, and disclosure may infringe upon privacy interests.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN4] Disclosure of public records thus involves two

fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy. Consequently, both the Freedom of Information Act and the California Public Records Act (the Act), *Cal. Gov't Code § 6250 et seq.* expressly recognize that the public's right to disclosure of public records is *not* absolute. In California, the Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to *§ 6254*; and (2) the catchall exception of *§ 6255*, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Administrative Law > Governmental Information > Personal Information > General Overview
[HN5] In evaluating whether a request for information lies within the scope of a Freedom of Information Act exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree unwarranted, a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect. The public interest in disclosure which must be weighed, is the interest in whether disclosure would contribute significantly to public understanding of government activities.

Administrative Law > Governmental Information > General Overview
[HN6] The burden of proof is on the proponent of nondisclosure, who must demonstrate a "clear overbalance" on the side of confidentiality. *Cal. Gov't Code § 6255.* The purpose of the requesting party in seeking disclosure cannot be considered. *Cal. Gov't Code § 6257.5.* This is because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general. It is also irrelevant that the requesting party is a newspaper or other form of media, because it is well established that the media has no greater right of access to public records than the general public. Nor is the convenience of researchers a factor to be considered.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN7] In determining whether public records which are *not* expressly exempted from disclosure must be disclosed over the government's objection, California courts apply the *Cal. Gov't Code § 6255* balancing test for the catchall exception on a case-by-case basis. Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN8] Courts have upheld the government's refusal to release public records when the public interest in nondisclosure clearly outweighed the public interest in disclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Administrative Law > Governmental Information > Personal Information > General Overview
Constitutional Law > Substantive Due Process > Privacy > Personal Information
[HN9] Disclosure of records regarding private citizens, identifiable by name, *is* not what the framers of the Freedom of Information Act had in mind. Courts scrutinize requests for disclosure of names and home addresses contained in public records, because individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail. The courts are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Administrative Law > Governmental Information > Personal Information > General Overview
[HN10] In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of shedding light on an agency's performance of its statutory duties. Where disclosure of names and addresses would not serve this purpose, denial of the request for disclosure has been upheld.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Administrative Law > Governmental Information > Personal Information > General Overview
Governments > Local Governments > Employees & Officials
[HN11] Courts recognize that the public interest in disclosure is minimal, even when the requester asserts that personal contact is necessary to confirm government compliance with mandatory duties, where the requester has alternative, less intrusive means of obtaining the information sought.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN12] Where the disclosure of names and addresses is necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power, disclosure is upheld.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Administrative Law > Governmental Information > Personal Information > General Overview
[HN13] The privacy rights of those who complain to their government is recognized when courts evaluate requests for disclosure of personal information from public records.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Administrative Law > Governmental Information > Personal Information > General Overview
[HN14] Disclosure of names and addresses of complainants may have the indirect effect of creating a specialized mailing list which is free available to anyone for any purpose.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Administrative Law > Governmental Information > Personal Information > General Overview
Transportation Law > Air Transportation > Noise Control
[HN15] Disclosure of the names, addresses, and telephone numbers of airport noise complainants is determined by application of the *Cal. Gov't Code § 6255* balancing test.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A newspaper initiated writ proceedings pursuant to the Public Records Act (*Gov. Code, § 6250 et seq.*), seeking to compel a city to disclose the names, addresses, and telephone numbers of persons who had made complaints to the city about municipal airport noise. The trial court ordered the city to disclose the information. (Superior Court of Santa Clara County, No. CV773524, Jamie A. Jacobs-May, Judge.)

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to enter a new and different order denying the newspaper's petition for a writ of mandate. The court held that, applying the *Gov. Code, § 6255*, balancing test of the Public Records Act, the public interest in the nondisclosure of the complainants' personal information clearly outweighed the public interest in disclosure. The complainants had a significant privacy interest in their names, addresses, telephone numbers as well as in the fact that they had made a complaint to their government, and disclosure of this information would have had a chilling effect on future complaints. In contrast, the public interest in disclosure of personal information about airport noise complainants was minimal. (Opinion by Cottle, P. J., with Premo and Elia, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Records and Recording Laws § 16—Inspection of Public Records—Public Records Act—Actions—Standard of Review. —Pursuant to *Gov. Code, § 6259, subd. (c)*, of the Public Records Act, an order of the trial court which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. The standard for review of the order is an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence.

(2) Records and Recording Laws § 12--Inspection of Public Records--Public Records Act--Purpose--Construction. --The Public Records Act (*Gov. Code, § 6250 et seq.*) was passed to ensure public access to vital information about the government's conduct of its business. The act was modeled upon the federal Freedom of Information Act (*5 U.S.C. § 552 et seq.*), and has a common purpose. Accordingly, federal legislative history and judicial construction of the Freedom of Information Act may be used in construing California's act.

(3) Records and Recording Laws § 12--Inspection of Public Records--Public Records Act--Freedom of Information Act--Public's Right to Disclosure--Exceptions--Test. --Disclosure of public records involves two fundamental yet competing interests: (1) prevention of secrecy in government and (2) protection of individual privacy. Consequently, both the federal Freedom of Information Act (FOIA) (*5 U.S.C. § 552 et seq.*) and the California Public Records Act (*Gov. Code, § 6250 et seq.*) expressly recognize that the public's right to disclosure of public records is not absolute. The Public Records Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to *Gov. Code, § 6254*, and (2) the catchall exception of *Gov. Code, § 6255*, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure, the burden of proof is on the proponent of nondisclosure, who must demonstrate a clear overbalance on the side of confidentiality. The purpose of the requesting party in seeking disclosure cannot be considered (*Gov. Code, § 6257.5*), because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general. It is also irrelevant that the requesting party is a newspaper or other form of media, because the media have no greater right of access to public records than the general public. Nor is the convenience of researchers a factor to be considered. Thus, in determining whether public records that are not expressly exempted from disclosure must be disclosed over the government's objection, courts apply the Gov. *Code, § 6255* balancing test for the catchall exception on a case-by-case basis. Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information.

(5) Records and Recording Laws § 16--Inspection of Public Records--Public Records Act--Actions--To Compel Disclosure of Airport Noise Complainants' Personal Information. --In writ proceedings initiated by a newspaper seeking to compel a city to disclose the names, addresses, and telephone numbers of persons who had made complaints to the city about municipal airport noise, the trial court erred in ordering the city to disclose the information. Applying the *Gov. Code, § 6255*, balancing test of the Public Records Act, the public interest in the nondisclosure of the complainant's personal information clearly outweighed the public interest in disclosure. The complainants had a significant privacy interest in their names, addresses and telephone numbers as well as in the fact that they had made a complaint to their government, and disclosure of this information would have had a chilling effect on future complaints. In contrast, the public interest in disclosure of personal information about airport noise complainants was minimal, since the city made available all the information it had concerning the complaints, except for the names, addresses, and telephone numbers of the complainants. The newspaper also had alternative means of contacting and interviewing the complainants.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1249 et seq.]

COUNSEL: Joan R. Gallo, City Attorney, George Rios, Assistant City Attorney, and Robert Fabela, Deputy City Attorney, for Petitioner.

Louise H. Renne, City Attorney San Francisco, Burk R. Delventhal, Deputy City Attorney, and Amy S. Ackerman, Deputy City Attorney, for City and County of San Francisco as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Edward P. Davis, Jr.; Skjerven, Morrill, MacPherson, Franklin & Friel and James M. Chadwick for Real Party in Interest.

JUDGES: Opinion by Cottle, P. J., with Premo and Elia, JJ., concurring.

OPINION BY: COTTLE

OPINION

[*1011] [**554] COTTLE, P. J.

I. INTRODUCTION

This original proceeding concerns an issue [***2] of first impression under the California Public Records Act, *Government Code section 6250 et seq.* [1] (the Act): whether a city may refuse to disclose the names, addresses, and telephone numbers of persons who have made complaints to the city about municipal airport noise. The City of San Jose (City) petitions for a writ of mandate directing respondent court to vacate its amended order and judgment, which (1) granted the petition of real party in interest, the San Jose Mercury News, Inc. (Mercury News), for a writ of mandate; and (2) directed issuance of a writ compelling City to disclose the names, addresses, [**555] and telephone numbers of all persons who made airport noise complaints in January 1998, with respective copy of the names, addresses, and telephone numbers of complainants where that information is protected by statute. [2]

1 All statutory references hereafter are to the Government Code, unless otherwise noted.

2 We granted the application of City and County of San Francisco and 21 additional cities for leave to file an amicus curiae brief in support of City's petition for writ of mandate. The additional cities on the brief are the cities of Albany, Alameda, Bakersfield, Benicia, Brentwood, Burlingame, Burbank, Carlsbad, Carpinteria, Chula Vista, Del Rey Oaks, Exeter, Fremont, Hawaiian Gardens, Hollister, Huntington Beach, Lafayette, Lakewood, Lindsay, Los Altos, Marina, Millbrae, Modesto, Monterey, Napa, Needles, Newport Beach, Pacifica, Palm Desert, Pico Rivera, Port Hueneme, Porterville, Redlands, San Diego, San Pablo, Santa Paula, Santa Rosa, Sunnyvale, Thousand Oaks, Tiburon, Tracy, Tulare, Vacaville, Victorville, Walnut, Walnut Creek, Westminster, Whittier, Woodlake, and the Town of Alberton.

[***3] City contends that respondent court erred, because the public interest in disclosure of the names, addresses, and telephone numbers of persons who have made airport noise complaints is clearly outweighed by the public interest in protecting the complainants' privacy and in preventing a chilling effect on complaints. We agree. Under the facts of this particular case, where [*1012] City makes public a monthly noise report and other records which provide a wealth of information about airport noise complaints, the public's interest in disclosure of the complainants' identity and personal information is minimal. It is not necessary to disclose the names, addresses, and telephone numbers of the complainants for the public to have access to vital information about City's performance of its state-mandated duty to record and report airport noise complaints. Accordingly, we find that the public interest in protecting the privacy of noise complainants and in preventing a chilling effect on complaints, clearly outweighs the public interest in disclosure of complainants' names, addresses, and telephone numbers. We therefore issue a peremptory writ of mandate as requested by City.

II. FACTUAL [***4] AND PROCEDURAL BACKGROUND

A. *The Mercury News's California Public Records Act Request*

City owns and operates the San Jose International Airport (Airport). In March 1998, the Mercury News, a daily newspaper of general circulation, sent a written request to Airport's director of aviation for disclosure of public records in accordance with the Act. In particular, the Mercury News sought access to the names, addresses, and telephone numbers of 215 individuals who had made

written, telephonic, or e-mail complaints about airport noise during the month of January 1998. The Mercury News also sought disclosure of tapes and transcriptions of the January 1998 telephonic complaints.

City operates Airport under a noise variance from California's airport noise standards, as set forth in the *California Code of Regulations, title 21, section 3012*. As a condition of maintaining the noise variance in effect, the California Department of Transportation requires City to implement a program for accepting, responding to, and reporting airport noise complaints. Members of the public may make complaints by telephoning Airport, and providing their name, address, telephone number, and time and nature [***5] of their complaint, either directly to Airport staff, or by leaving a recorded message. The complaints are made voluntarily, and Airport does not provide any assurances of confidentiality. City intends the noise complaint program to encourage complaints, which are then independently investigated by City.

As part of its program, City prepares monthly noise reports. These reports summarize the following complaint information for each month: (1) the total number of noise complaints; (2) how many persons made the complaints: (3) average complaints per day; (4) location of complaints [**556] by city area; (5) time of day of complaints; and (6) a breakdown of the nature of the complaints, [*1013] including categorization of whether private or commercial planes were involved, and the type of complaints (intrusion, loud aircraft, overflight, frequency, or other).

City also maintains a computer data base which it describes as "contain[ing] the names, addresses, telephone numbers, the date and time of the actual event as reported by the complainant, the date and time the call was recorded, the complainant's reported zip code, the designated noise sensitive area corresponding [***6] to specific zip codes, whether the complainant is a first time caller, whether the complaint regards a commercial or general aviation flight, the type of complaint (e.g. loud, frequency or intrusion related), and any additional comments made by the complainant and flight details regarding intrusions associated with the complaint." A printed summary of the complaint data base, excluding the names, addresses, and telephone numbers of the complainants, can be prepared by City.

In response to the Mercury News's request for disclosure under the Act, the San Jose City Attorney's office advised that City could not release the names, addresses and telephone numbers of the complainants because their privacy rights outweighed the public interest in disclosure. The city attorney also advised that City had no transcriptions of complaint calls. However, City provided the newspaper with a copy of its monthly noise report. City also offered to provide the Mercury News with a list indicating the date and time of each telephone call, and the nature of the airport noise complaint made during the call.

B. *Writ Proceedings in the Trial Court*

The Mercury News was not satisfied with the airport [***7] noise complaint information provided by City, and filed a petition for a writ of mandate in respondent court, pursuant to section 6258. [3] The petition sought a writ of mandate compelling City to disclose the names, addresses and telephone numbers of the January 1998 airport noise complainants, as well as all tapes and transcriptions of their complaints. The Mercury News argued that it was entitled to disclosure of this information under the Act, because the information concerned a matter of significant public interest, airport noise, and therefore the public interest in disclosure was not outweighed by the complainants' privacy interest.

3 Section 6258 provides, in pertinent part, "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter."

Specifically, the Mercury News contended in its petition that writ [***8] relief was necessary, because "[w]ithout the identity of the complainants or specifics regarding their complaints, the summary information offered by the [*1014] City is next to useless. The validity of the complaints cannot be evaluated without access to those individuals doing the complaining. Understanding the extent of the noise problem--and thereby providing information to the public as the positions of the City and those complaining about the noise can be evaluated--is impossible without access to the details, e.g., the nature of the complaints themselves."

Respondent court issued an alternative writ of mandate and order to show cause in April 1998. City filed opposition to the petition for writ of mandate. In its

opposition, City argued that the airport noise complainants' privacy interest in their personal information outweighed the public interest in disclosure of their names, addresses, and telephone numbers. If this personal information was disclosed, City asserted, the complainants would be subject to harassment and intimidation, and the public's reporting of airport noise complaints would be chilled.

[**557] In support of its arguments in opposition, City [***9] submitted copies of e number of letters it had received from Jon Rodgers (Rodgers), representing an organization called Aircraft Pilots of the Bay Area, Inc. (Aircraft Pilots). In his letters, Rodgers requested that City comply with the Act by disclosing the names, addresses, and telephone numbers of airport noise complainants. City had refused to do so. Additionally, City submitted a copy of an article from a newsletter captioned "California Pilot, Official Publication of California Pilots Association[,] The Airport Defender," dated May 1995. The newsletter article was entitled "The More You Complein, the More You Must Disclose" and discussed Rodgers's efforts to obtain disclosure of the identity of airport noise complainants. Included in the article was the following statement: "The effect of Rodgers' message on complaining homeowners and anti-airport groups has been salutary. . . . [P] As reported last month, the latest shining example of how well the disclosure law works when anti-airport groups are given the message, is the success of the Tehoe Valley Airport. Noise complaints there fell from a high of 450 prior to 1994, to only 36 last year."

On June 5, 1998, respondent [***10] court held a hearing on the Mercury News's petition for a writ of mandate. The court granted the petition, explaining that the public interest in receiving information about airport noise complaints was very strong: "[T]he public has the right to know whether or not the governmental entity is doing a good job in taking care of the problems and what the nature and extent of the complaints are to hold the governmental entity accountable for decision making in that regard." The court concluded that this strong public interest was not outweighed by City's mere speculation that disclosure of complainants' names, addresses, and telephone numbers would chill further complaints, noting that City's evidence of potential [*1015] harassment by pilots' organizations was based on old letters which lacked probative value, and because there was no evidence of pilots' organizations actually intimidating a noise complainant. On June 23, 1998, the court issued the writ of mandate as requested by the Mercury News.

Subsequently, City filed a motion for reconsideration pursuant to *Code of Civil Procedure section 1008*, contending that it had new evidence of the threat [***11] of intimidation of airport noise complainants by the Aircraft Pilots organization. The new evidence submitted by City included more recent letters from the Aircraft Pilots organization to the manager of the Van Nuys Airport, in which the organization requested disclosure of name, address and telephone number of a frequent airport noise complainant. City also submitted copies of letters from Aircraft Pilots to real estate brokers. The letters advised the real estate brokers of the risk that homeowners would expose themselves to fraud liability if they complained about airport noise, then later failed to disclose the noise problem to home buyers.

Respondent court granted the motion for reconsideration, and on September 24, 1998, issued an amended writ of mandate. As a result of the Mercury News's concession during oral argument that certain complainants' personal information should be redacted, the writ stated, "immediately upon receipt of this writ to permit public access to and provide copies of the complaints about Airport noise received by the City or the San Jose Airport, including, if any, transcriptions of the complaints, and the names, addresses, and phone numbers of the individuals [***12] who complained. You may within 20 days redact from the records provided pursuant to this order and judgment the names, addresses, and/or phone numbers of the individuals who have complained and whose names, addresses, and/or phone numbers are expressly made exempt from public disclosure by statute." The court stayed the execution of the amended writ of mandate until such time as this court issued a ruling on whether [**558] the writ would be stayed pending appellate review.

C. *Writ Proceedings in the Appellate Court*

City objected to the trial court's amended order and judgment directing issuance of the writ to City, and filed a writ petition in this court, seeking a peremptory writ of mandate directing respondent court to vacate its amended order and judgment, and to issue a new order denying the Mercury News's writ petition. City also requested a temporary stay of the amended order pending our consideration of its writ petition. We granted the temporary stay as requested, and issued an order to show

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cause why the relief sought by City in its petition for writ of mandate should not be granted.

(*1016) III. DISCUSSION

A. *The Standard of Review for Orders Under* (***13) *the Act*

(1) [HN1] Pursuant to section 6259, subdivision (c), an order of the trial court under the Act, which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1336 [283 Cal. Rptr. 893, 813 P.2d 240] (hereafter *Times Mirror*).) The standard for review of the order is "an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence." (*Ibid.*) In the present case, respondent court made a finding that City had not shown that any airport ooine complainants were actually intimidated by the possibility of disclosure of their names, addresses, and telephone numbers, and we conclude that substantial evidence supports that finding. Keeping that finding in mind, we review respondent court's amended order and judgment de novo.

B. *Disclosure of Public Records and the Right to Privacy*

(**14) Section 6250 expressly sets forth the purpose of the Act: [HN2] "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (See *Times Mirror, supra*, 53 Cal. 3d at p. 1338; see also *Wilson v. Superior Court* (1998) 51 Cal. App. 4th 1136, 1141 [59 Cal. Rptr. 2d 537].)

(2) Thus, the Act was passed "to ensure public access to vital information about the government's conduct of its business." (*CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 656 [230 Cal. Rptr. 362, 725 P.2d 470]* (hereafter *CBS*).)

The Act was modeled upon the federal Freedom of Information Act (*5 U.S.C. § 552 et seq.*, hereafter FOIA), and has a common purpose. (*Times Mirror, supra*, 53 Cal. 3d at p. 1338; see also *Department of Defense v. FLRA (1994) 510 U.S. 487 [114 S. Ct. 1006, 127 L. Ed. 2d 325]* (hereafter *Department of Defense*) [FOIA's (***15] "'core purpose' " (*Id. at p. 495 [114 S. Ct. at p. 1012]*) is to contribute significantly to public understanding of government activities].) Accordingly, federal "legislative history and judicial construction of the FOIA" may be used in construing California's Act. (*Times Mirror, supra*, 53 Cal. 3d at p. 1338.)

[HN3] Disclosure of public records has the potential to impact individual privacy. The Act defines "public records" broadly to include "any writing containing (*1017) information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (§ 6252, subd. (e); *Wilder v. Superior Court* (1998) 66 Cal. App. 4th 77, 81 [77 Cal. Rptr. 2d 629].) Public records (**559] can include "personal details about private citizens," and disclosure may infringe upon privacy interests. (*U.S. Dept. of Justice v. Reporters Committee* (1989) 489 U.S. 749, 764, 766 (109 S. Ct. 1468, 1477-1478, 103 L. Ed. 2d 774) (hereafter *Reporters Committee* (***16]); see also *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 651 [117 Cal. Rptr. 106] (hereafter *Black Panther Party*) ["[s]ocietal concern for privacy focuses on minimum exposure of personal information collected for governmental purposes"].)

(3) [HN4] Disclosure of public records thus involves two fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy. (*Black Panther Party, supra*, 42 Cal. App. 3d at p. 651.) Consequently, both the FOIA and the Act expressly recognize that the public's right to disclosure of public records is not absolute. [4] In California, the Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to section 6254 [5] ; and (2) the "catchall exception" of section 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. (***17] [6] (*CBS, supra*, 42 Cal. 3d at p. 652.)

4 An FOIA example is exemption 6, which protects personnel and medical and similar files when "disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)). (*Department of Defense, supra*, 510 U.S. at pp. 494-495 [114 S. Ct. at pp. 1011-1013].)

5 Personal information expressly protected from disclosure under the Act, as set forth in section 6254, include library circulation records (subd. j), statements of personal worth or financial data collected by a licensing agency (subd. n), information contained in applications to carry concealed weapons (subd. (u)(1)), home addresses and telephone numbers of peace officers, judges, court commissioners set forth in applications or licenses to carry concealed weapons (subd. (u)(2), (3)), and financial data in applications for registration as a service contractor (subd. (x)). Other personal information also expressly exempted from disclosure by the Act includes home addresses and telephone numbers of registered voters (§ 6254.4), home addresses, telephone numbers and usage data of utility customers (§ 6254.16), home addresses and telephone numbers of elected or appointed officials (§ 6254.21), home addresses and telephone numbers of state, school district, and county office of education employees (§ 6254.3) residence addresses in Department of Housing and Community Development records where confidentiality requested (§ 6254.1, subd. (n)), and residence or mailing addresses in Department of Motor Vehicles records (§ 6254.1).

(***18]

6 Section 6255 provides, "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

(*1018) A similar balancing test is utilized in FOIA cases, when an issue of disclosure versus privacy arises: [HN5] "[I]n evaluating whether a request for information lies within the scope of a FOIA exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree 'unwarranted,' a court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect." (*Department of Defense, supra*, 510 U.S. at p. 495 [114 S. Ct. at p. 1012].) The public interest in disclosure which must be weighed, is the interest in whether disclosure would [***19] contribute significantly to public understanding of government activities. (*Ibid.*)

(4) [HN6] The burden of proof is on the proponent of nondisclosure, who must demonstrate a "clear overbalance" on the side of confidentiality. (§ 6255; *Black Panther Party, supra*, 42 Cal. App. 3d at p. 657.) The purpose of the requesting party in seeking disclosure cannot be considered. (§ 6257.5; *Connell v. Superior Court* (1997) 56 Cal. App. 4th 601, 616 [65 Cal. Rptr. 2d 738]; see also *Department* [**560] *of Defense, supra*, 510 U.S. at p. 495 [114 S. Ct. at pp. 1012-1013].) This is because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general. (*Black Panther Party, supra*, 42 Cal. App. 3d at p. 656.) It is also irrelevant that the requesting party is a newspaper or other form of media, because it is well established that the media has no greater right of access to public records than the general public. (*Rogers v. Superior Court* (1993) 19 Cal. App. 4th 469, 476 [23 Cal. Rptr. 2d 412].) (***20] Nor is the convenience of researchers a factor to be considered. (*Reporters Committee, supra*, 489 U.S. at p. 772, fn. 20 (109 S. Ct. at p. 1481] ["... it was never suggested that the FOIA would be a boon to academic researchers, by eliminating their need to assemble on their own data which the government has already collected' ").)

Thus, [HN7] In determining whether public records which are not expressly exempted from disclosure must be disclosed over the government's objection, California courts apply the section 6255 balancing test for the catchall exception on a case-by-case basis. Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information. (See *CBS, supra*, 42 Cal. 3d at pp. 656-657 (names, home addresses and applications of persons who obtained concealed weapons permits must be disclosed); *New York Times Co. v. Superior Court* (1990) 218 Cal. App. 3d 1579, 1585-1586 [268 Cal. Rptr. 21] (disclosure (***21] of names and addresses of excessive water users ordered); *New York Times Co. v. Superior Court* (1997) 52 Cal. App. 4th 97, 104 [60 Cal. Rptr. 2d 410] (names of sheriff's deputies who fired weapons must be disclosed).)

(*1019) Conversely, [HN8] courts have upheld the government's refusal to release public records when the public interest in nondisclosure clearly outweighed the

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public interest in disclosure. (See *Reporters Committee, supra*, 489 U.S. at pp. 774-775 [109 S. Ct. at pp. 1482-1483] [no disclosure of FBI rap sheet when disclosure would serve curiosity rather than public interest]; *Times Mirror, supra*, 53 Cal. 3d at p. 1345-1346 [Governor's appointment schedules and calendars properly withheld to protect public interest in decisionmaking process and governor's security]; *Wilson v. Superior Court, supra*, 51 Cal. App. 4th at p. 1141 [no disclosure of applications for appointment to county board of supervisors due to chilling effect on applications and negative impact on decisionmaking process].)

*C. Disclosure [**422] of the Identities and Personal Information of Complainants*

As the decisions noted above indicate, requests for disclosure of public records which contain personal information about individuals often trigger litigation under the Act and the FOIA. However, no decisions have been cited by the parties or located through our own research, which address the issue of whether a city must disclose identities of airport noise complainants. Public records decisions in other contexts, which concern the disclosure of addresses and telephone numbers, and/or the identity of complainants, provide a helpful framework for deciding the issue at hand.

1. Disclosure of Names and Addresses

First, we note that the United States Supreme Court has stated that, [HN9] "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." (*Reporters Committee, supra*, 489 U.S. 749, 765 [109 S. Ct. 1468, 1478].) Courts have scrutinized requests for disclosure of names and home addresses contained in public records, because individuals have [***23] a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail. (*Department of Defense*, [**561] *supra*, 510 U.S. at pp. 500-501 [109 S. Ct. at pp. 1015-1016] ["We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions."].)

[HN10] In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of "'shed[ding] light on an agency's performance of its statutory duties.' " (*Yeschke v. F.B.I.* (D.D.C. 1995) 940 F. Supp. 323, 330 (hereafter *Yeschke*).) Where disclosure of names and addresses would not serve this purpose, denial of the request for disclosure has been upheld. (*Department of Defense, supra*, 510 U.S. at p. 502 [114 S. Ct. at p. 1016] [*1020] ["privacy interest of bargaining unit employees in nondisclosure of their home addresses [***24] substantially outweighs the negligible FOIA-related public interest in disclosure"]; *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479, 1486 (hereafter *Painting Industry*) [no disclosure of names and addresses on employee payroll when disclosure only marginally useful in uncovering " 'what the government is up to' "]; *Painche, supra*, 940 F. Supp. at p. 330 [workings of agencies not better understood by disclosure of identity of employers and private citizens who wrote to government officials]; *Local 1774, Ill. Fed. of Teachers v. Niles* (1997) 287 Ill.App.3d 187, 193 [222 Ill.Dec. 602, 678 N.E.2d 9, 13] [names and addresses of school district parents had "nothing to do with the duties of any public servant"].) [HN11] Courts have also recognized that the public interest in disclosure is minimal, even when the requester asserts that personal contact is necessary to confirm government compliance with mandatory duties, where the requester has alternative, less intrusive means of obtaining the information sought. (See, [***25] e.g., *Painting Industry, supra*, 26 F.3d at p. 1483.)[HN12]

However, where the disclosure of names and addresses is necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power, disclosure has been upheld. (*CBS, supra*, 42 Cal. 3d at p. 656 [revealing identity of concealed weapons permit holders permits public ascertainment of whether law applied evenhandedly]; *New York Times v. Superior Court, supra*, 52 Cal. App. 4th at pp. 104-105 [disclosure of names of sheriff's deputies who fired fatal shot permits check against arbitrary exercise of official power]; *New York Times v. Superior Court, supra*, 218 Cal. App. 3d at p. 1385 [disclosure of excess water users will ensure individuals do not receive special privileges].)

2. Disclosure of the Identity of Complainants

[HN13] The privacy rights of those who complain to their government have [***26] also been recognized when courts evaluate requests for disclosure of personal information from public records. With regard to

complaints of criminal wrongdoing, it has been stated, "Complainants often demand anonymity. The prospect of public exposure discourages complaints and inhibits effective enforcement." (*Black Panther Party, supra*, 42 Cal. App. 3d at p. 653.) In determining that letters of complaint to the Federal Aviation Agency about a pilot were exempt from disclosure under the FOIA, the federal appeals court noted the President's statement when signing the FOIA into law: " 'A citizen must be able in confidence to complain to his Government and to provide information . . . . I know the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of [*1021] information.' " (*Ryrie v. Department of Transportation of United States* (5th Cir. 1971) 446 F.2d 821, 824, fn. 1.)

[**562] Similarly, a New York state appeals court judge remarked, "I do not believe that a citizen who complains to or inquires of his government [***27] expects that his correspondence revealing among other things his identity and home address will come into the hands of private entrepreneurs who seek to solicit his business." (*Gandstein v. Shaw* (1983) 119 Misc.2d 400 [463 N.Y.S.2d 162] (hereafter *Gandstein*) [denying under New York Freedom of Information Law an attorney's request for names and addresses of complainants to the state's division of human rights].) This decision and others recognize [HN14] that disclosure of names and addresses of complainants may have the indirect effect of creating a specialized mailing list which is then available to anyone for any purpose. (*Gandstein, supra*, 119 Misc.2d at pp. 400-401 [463 N.Y.S.2d at pp. 163-163]; see also *Center for Auto Safety v. NHTSA* (D.D.C. 1993) 809 F. Supp. 148, 149-150 (hereafter *Center for Auto Safety*).)

In *Center for Auto Safety*, 809 F. Supp. 148, the privacy rights of complainants under the FOIA were considered by a federal district court. In this case, a private consumer group called the Center [***28] for Auto Safety requested disclosure under FOIA of the names and addresses of individuals who had complained to the National Highway Traffic Safety Administration (NHTSA) about auto safety problems. The Center for Auto Safety argued that the government agency's summaries of complaints were not sufficient, because the group needed to contact the complainants individually. (*Center for Auto Safety, supra*, 809 F. Supp. at p. 149.)

The court upheld NHTSA's refusal to disclose the names and addresses of the complainants, on grounds of the public interest in the rights of citizens to complain to their government in privacy and to be left alone. (*Center for Auto Safety, supra*, 809 F. Supp. at p. 150.) The court concluded, "Since the consequences of a general mailing list of complainants concerned with auto safety are clearly and foreseeably intrusive, complainants will have forfeited a degree of privacy because they chose to alert the proper agency of government to circumstances suggesting tighter auto safety controls . . . a specialized list [of complainants], by its very nature, will be used by individuals and concerns that do not necessarily share the same concerns of [***29] those listed but see a commercial or private advantage in exploiting them." (*Id.* at p. 149.) Further, the court found that no ascertainable public interest would be served by disclosure of the identities of the auto safety complainants, and therefore the public interest in disclosure was outweighed by the privacy interests of the complainants. (*Id.* at p. 150.)

As discussed below, application of the balancing test in the present case also compels the conclusion that the public interest in protecting the privacy interests of the complainants outweighs the public interest in disclosure.

[*1022] D. *The Public Interest in Nondisclosure of Airport Noise Complainants' Personal Information Clearly Outweighs the Public Interest in Disclosure Under the Particular Facts of This Case*

(5) While no appellate courts have addressed the issue of whether a city must disclose the names, addresses, and telephone numbers of airport noise complainants, the California Attorney General has issued an opinion on the issue. (*78 Ops.Cal.Atty.Gen. 103 (1995).*) Utilizing the balancing test for the *section 6255* catchall exception, the Attorney General concluded, [***30] ". . . the names, addresses and telephone numbers of persons who have filed noise complaints concerning the operations of a city airport are subject to public disclosure unless the city can establish in the particular circumstances that the public interest served by not making the information public clearly outweighs the public interest served by disclosure." (*78 Ops.Cal.Atty.Gen., supra*, at p. 110.) We agree that [HN15] disclosure of the names, addresses, and telephone numbers of airport noise complainants [**563] is determined by application of the *section 6255* balancing

test.

City contends that the trial court erred in ordering disclosure, because City prevails when the *section 6255* balancing test is properly applied. In City's view, the public interest in protecting airport noise complainants' privacy outweighs the Mercury News's argument that disclosure is in the public interest. While City acknowledges that there is a keen public interest in airport noise, City asserts that disclosure of complainants' personal information will not assist the public to determine if City is properly [***31] performing its state-mandated noise monitoring functions. Instead, City believes that its ability to perform its duties with respect to airport noise will be harmed by disclosure of complainants' identities, because, as shown by the activities and correspondence of groups such as Aircraft Pilots, disclosure will have a chilling effect and reduce the number of complaints.

In opposition, the Mercury News argues two main points: (1) City has not met its burden to show a clear overbalance on the side of confidentiality; and (2) City's arguments of a chilling effect on citizen complaints are based on speculation, as City lacks evidence of any citizen actually being harassed or deterred from making a complaint as a result of the disclosure of his or her name, address, and telephone number. Specifically, the Mercury News argues that airport noise is a matter of important public interest, and the public is entitled to determine whether city is meeting its obligations under state law to handle airport noise complaints. According to the Mercury News, it is only by obtaining the identity of airport noise complainants that the public and the media can ascertain whether city officials are performing [***32] their duties, since "the validity of those complaints cannot be evaluated because secrecy prevents contact of complainants in order to verify the [*1023] complaints and learn more about their concerns. The dry statistics offered by the City are not enough. The public is entitled to raw data, i.e., information that can be confirmed through interviews and observation."

Additionally, the Mercury News contends that the public would benefit from disclosure of complainants' identity, because disclosure would deter false or frivolous complaints. The Mercury News asserts as well that the complainants' privacy interest is minimal because complainants provide their names, addresses, and telephone numbers voluntarily and without any guarantees of confidentiality.

In response, City contends that the Mercury News's own arguments reveal that disclosure of the identity of airport noise complainants will have a chilling effect on complaints, because the newspaper's purpose in obtaining their identity is to contact complainants directly. According to City, citizens who wish to make an airport noise complaint will have no choice but "to remain silent while maintaining their privacy, or else [***33] register their complaints at the risk of being questioned in their homes by the press or other persons as to whether they are telling the truth." Also, City points out that the Mercury News has alternative means of contacting airport noise complainants other than by invading their privacy. City suggests that the newspaper could contact and interview complainants by locating them at city council meetings, through anti-airport noise community groups and their Web sites, or by canvassing the city areas in which noise complaints are most concentrated.

We agree with City that, applying the *section 6255* balancing test to the particular facts of this case, the public interest in the nondisclosure of airport complainant's personal information clearly outweighs the public interest in disclosure. Therefore, the trial court erred in ordering City to disclose the names, addresses, and telephone numbers of the January 1998 airport noise complainants. In so ruling, we recognize the Mercury News's argument that it is in the public interest for the [**564] newspaper to be able to contact the complainants individually in order to confirm that their complaints have been properly recorded and reported [***34] by City as required by its state noise variance. We also understand the Mercury News's implied argument that City may be motivated to underreport airport noise complaints and thereby prevent any negative impact on airport expansion.

However, in this particular case, City discloses a substantial amount of detailed information about public complaints of airport noise. This information provides the public with data to analyze City's performance of its duty to record, investigate and report airport noise complaints. We also find that airport noise complainants have a significant privacy interest in their names, [*1024] addresses, and telephone numbers as well as in the fact that they have made a complaint to their government, and that disclosure of this information would have a chilling effect on future complaints.

Courts have not required evidence that an individual was actually deterred from making a complaint by the prospect of public disclosure. Instead, courts have based their recognition of the likely effect of disclosure on human experience. (See, e.g., *Black Panther Party, supra*, 42 Cal. App. 3d at p. 653 ["The prospect of public exposure discourages complaints. [***35] "]; *Times-Mirror, supra*, 53 Cal. 3d at p. 1345 ["To disclose every private meeting or association of the Governor and expect the decisionmaking process to function effectively, is to deny human nature and contrary to common sense and experience." (italics omitted)]; *Center for Auto Safety, supra*, 809 F. Supp. at p. 149 ["[T]he consequences of a general mailing list of complainants concerned with auto safety are clearly and foreseeably intrusive."].) Therefore, "... like the United States Supreme Court, our perception that those who expect public dissemination of their remarks may well temper candor with a concern for appearance,' is based upon 'human experience . . . ' (*California First Amendment Coalition v. Superior Court (1998) 67 Cal. App. 4th 159, 173 [78 Cal. Rptr. 2d 847]*, quoting *United States v. Nixon (1974) 418 U.S. 683, 705 [94 S. Ct. 3090, 3106, 41 L. Ed. 2d 1039]*.)

Accordingly, it may be fairly inferred, on the basis of human experience, that it is likely that public disclosure of airport complainants' names, addresses and telephone numbers will have a chilling effect on the number of complaints made. Public [***36] disclosure will subject the complainants to the loss of confidentiality in their complaints, and also to direct contact by the media and by persons who wish to discourage complaints. It also may be presumed that a reduction in airport noise complaints will impede City in its ability to comply with its airport noise monitoring duties.

In contrast, the public interest in disclosure of personal information about airport noise complainants is minimal, because City has made available all the information it has concerning airport noise complaints, except for the names, addresses, and telephone numbers of the complainants. The information provided by City in its monthly noise report and data base printout is extensive, and indicates the date, time and nature of each complaint, as well as the city area where the complaint originated. Not only does the monthly noise report provide a comprehensive overview of City's performance of its state-mandated duty to report airport noise complaints, the report also provides the Mercury News with information which will aid it in further investigation of the complaints.

As City notes, the Mercury News has alternative means of contacting and interviewing [***37] the complainants other than by intruding on their privacy [*1025] through forced disclosure of their identities from government records. The newspaper may directly contact complainants who have made their identities public, for example, by appearing at city council meetings, by joining anti-airport noise community groups, or by disclosing themselves on the [**565] group's Web site. The Mercury News may also identify from the monthly noise reports those neighborhoods from which complaints originate, and canvass those neighborhoods for complainants who are willing to be interviewed.

We recognize that a mailing and telephone list of airport complainants would greatly facilitate the Mercury News's investigation. However, facilitating research is not the purpose of public access to government records. (See *Reporters Committee, supra*, 489 U.S. at p. 772 [109 S. Ct. at p. 1481].) While media research may serve the public interest by assisting public records which show how the government conducts its business, investigations at the expense of individual privacy cannot be allowed for the sole purpose of media convenience. Where, as here, the media and members [***38] of the public can obtain the identity of complainants through less intrusive means, disclosure of complainants' personal information is likely to chill future complaints. Because alternative information is available regarding the city's complaint-related operations, the public interest in protecting the privacy of complainants clearly outweighs the public interest in disclosure of their names, addresses and telephone numbers from government records.

IV. DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its amended order and judgment of September 24, 1998, and to enter a new and different order denying the San Jose Mercury News's petition for writ of mandate. Each party is to bear its own costs in this original proceeding.

Premo, J., and Elia, J., concurred.

The petition of real party in interest for review by the Supreme Court was denied December 1, 1999. Mosk, J., was of the opinion that the petition should be granted.

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. SCHMIDT.

No. 178.

SUPREME COURT OF THE UNITED STATES

177 U.S. 230; 20 S. Ct. 620; 44 L. Ed. 747; 1900 U.S. LEXIS 1792

Argued March 12, 13, 1900.
April 9, 1900, Decided

PRIOR HISTORY: ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

THE three corporations directly or indirectly involved in this controversy are the Northern Division of the Cumberland and Ohio Railroad Company, the Louisville, Cincinnati and Lexington Railway Company and the Louisville and Nashville Railroad Company. In order to abbreviate we shall refer to them respectively as the Cumberland and Ohio, the Cincinnati and Lexington and the Louisville and Nashville.

On July 2, 1879, the Cumberland and Ohio mortgaged its road to secure its certain negotiable bonds.

On July 28, 1879, the Cumberland and Ohio leased its road for thirty years to the Cincinnati and Lexington. The lease provided that if the earnings of the Cumberland and Ohio proved inadequate to pay the interest on the bonds, secured by the mortgage above referred to, the lessee, the Cincinnati and Lexington, would "supply the deficiency so far as it may be done by appropriating the net earnings, or so much as may be needed, on its own lines, which may accrue by reason of business coming to it from or over said first party's line." The lease provided that the lessee, the Cincinnati and Lexington, should not assign the contract without the consent of the lessor, the Cumberland and Ohio. Contemporaneously with the execution of the lease and in order to secure the carrying out of the stipulation providing for the application of certain stated earnings of the Cincinnati and Lexington to the payment of the interest on the bonds of the Cumberland and Ohio, the former corporation executed a mortgage in favor of the bondholders of the Cumberland and Ohio, hypothecating the net earnings on the Cincinnati and Lexington arising from business coming from the leased line. Although the Cumberland and Ohio did not abandon its corporate life and preserved its formal existence, all its railroad and appurtenances as a result of the lease passed from its own to the control of the Cincinnati and Lexington.

In November, 1881, the Cincinnati and Lexington conveyed all its property to the Louisville and Nashville, and made to the latter an assignment of the lease of the property of the Cumberland and Ohio. Despite the fact that the assignment of the lease was not approved by the original lessor, the Cumberland and Ohio, as provided in the lease, the Louisville and Nashville took control of both the roads of the Cincinnati and Lexington and Cumberland and Ohio, and operated the same, reaping all the revenues of every kind arising therefrom. In 1885, default having supervened in the payment of the interest on the bonds of the Cumberland and Ohio, issued and secured as above stated, the trustee under the mortgage commenced proceedings against the Cincinnati and Lexington to enforce the mortgage on net earnings derived from business of the Cumberland and Ohio. It is not denied that at the time the action was commenced the fact of the transfer of the property of the Cincinnati and Lexington and the assignment of the lease of the Cumberland and Ohio to the Louisville and Nashville was known to the trustee. However, the Cincinnati and

Lexington was the only party made defendant. The relief sought was a discovery of the amount of net earnings, derived from business coming from the Cumberland and Ohio, and a decree for the amount, when ascertained, for the benefit of the mortgage bondholders. A most protracted and hotly contested lawsuit ensued. The question of earnings coming to the Cincinnati and Lexington from business over the Cumberland and Ohio was thoroughly explored by reports, expert examination of books, testimony, etc., resulting in what is denominated by counsel for the plaintiff in error in their brief as a "wilderness of figures." At last a final decree was entered fixing the earnings which under the contract were attributable to the mortgage creditors of the Cumberland and Ohio, at the sum of $53,565.62, which the defendant was ordered to pay into court with interest by a day stated. The sum not having been paid a rule was taken on the defendant to compel performance, and in response it was answered:

"That in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it."

The sale referred to in this answer being that which had been made by the Cincinnati and Lexington of all its property, including the assignment of the lease held by it from the Cumberland and Ohio to the Louisville and Nashville. In reply to a rule taken on the defendant to report the amount of net earnings which had accrued subsequent to the period embraced by the decree for $53,565.62, the defendant said:

"States and shows to this court that it has not made any net earnings, or earnings of any kind, since the date aforesaid, on business coming to it from or over the Cumberland and Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid."

Thereupon the plaintiff sought leave by an amended and supplemental petition to make the Louisville and Nashville a party defendant to the cause. Among others the following averments were contained in the petition:

"Plaintiffs state that prior thereto the said Louisville and Nashville Railroad Company had purchased and acquired and at the time of said conveyance held the capital stock of the said Louisville, Cincinnati and Lexington Railway Company, and as such stockholder took and appropriated and has ever since enjoyed the whole purchase price of the Louisville, Cincinnati and Lexington Railway Company and all its said properties.

"Plaintiffs state that after the execution of said deed of November 1, 1881, said Louisville and Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati and Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern Division of the Cumberland and Ohio Railroad Company aforesaid, and began to operate and has ever since operated said railroads and properties and taken and appropriated to its own use the earnings thereof.

"Plaintiffs state that at all times since November 1, 1881, said Louisville and Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by virtue thereof, has operated the said Northern Division of the Cumberland and Ohio Railroad and the said Louisville, Cincinnati and Lexington Railway and properties, and has made all the earnings mentioned and proved in the reports of the several commissioners in this case, and ascertained and adjudged in the several judgments of this court, and finally adjudged in the opinion and judgment of the Court of Appeals herein, all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati and Lexington Railway Company.

"Plaintiffs further state that the Louisville and Nashville Railroad Company at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati and Lexington Railroad Company actually knew all the provisions of the lease, mortgages and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties thereto referred to, in accordance with said lease, mortgages and contracts, from the time of its said purchase until the 1st day of April, 1893, and knew at all times, including the time during which this action has been pending, that it had operated said railroad and all the other property of said

Louisville, Cincinnati and Lexington Railway Company, and of the Northern Division of the Cumberland and Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation of the railroad and properties of the Louisville, Cincinnati and Lexington Railway Company and the Northern Division of the Cumberland and Ohio Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati and Lexington Railway Company, and filed all other papers which were filed herein on behalf of the defence, and itself employed counsel in this case to make defence in the name of the Louisville, Cincinnati and Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defence of this action, and has been in court defending this action and has controlled the defence thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the -- day of --, 1885, and from the time the said Louisville and Nashville Railroad Company caused the answer to said petition to be filed herein on the -- day of --, 1886."

The leave to file was denied on the ground that it was too late to do so after judgment. This order, refusing to allow the amendment, was affirmed by the Court of Appeals of the State of Kentucky. That court, however, in its opinion intimated that the amendment was not necessary if the averments of the supplemental and amended petition were true, and that under the facts the Louisville and Nashville might be proceeded against by rule to show cause. *99 Kentucky, 143.* Following the path thus pointed out by the Court of Appeals, a rule in the lower court was applied for to compel the Louisville and Nashville to pay the amount of the judgment. The court considered the suggestion which had been made, in the opinion of the Court of Appeals, as not binding on it, and hence declined to allow the rule on the ground that the Louisville and Nashville not having been named as a defendant in the proceeding could not be by rule condemned to pay the judgment. The Court of Appeals reversed the order of the trial court and directed the rule to issue as prayed for. The court in effect held that as the affidavit by which the rule was supported in substance charged that the Louisville and Nashville prior to and during the entire suit had operated the roads from which the revenues accrued which were in controversy, and that that corporation had in substance volunteered in the cause to defend the same in the name of the technical defendant; had carried on the defence through its own counsel, had paid all the expenses of the litigation; the officers of the corporation which was technically a defendant being the officers of the Louisville and Nashville, therefore, the Louisville and Nashville had had under the laws of Kentucky due notice of the suit, and ample opportunity to defend, in fact had actually carried on the defence, and could hence be condemned by rule to pay the judgment. The trial court thereupon entertained and issued the rule, which was served on the Louisville and Nashville. That corporation for answer to the rule said, among other things:

First. "That it is not a party to this suit. It has not been named in any pleading in the case as a party, and there is no averment made in any pleading in the case against this respondent, or that is applicable to this respondent, and no judgment or order has ever been entered in this case against this respondent, and no process has ever issued against or ever been served on this respondent."

Second. "There has never been a time from the institution of this suit up to this time when this respondent could, with propriety, have filed an answer setting up its defences against the alleged claim of the plaintiff, and to require it now to pay into court upon this rule the amount stated in the rule, or any other amount, would be to deprive this respondent of its property without due process of law, contrary to the Constitution of the United States in such cases made and provided."

The answer then pleaded a set-off to the amount of $16,524.37, which it was claimed the Louisville and Nashville should be allowed if it was held bound to pay the judgment. The conclusion of the answer was as follows: "Wherefore having fully responded, this respondent prays that the rule herein be discharged." The court, having expressed in a careful opinion its view that the Louisville and Nashville could not be condemned, by rule, because it had not been a technical party to the record, nevertheless, considering itself bound by the action of the Court of Appeals, made the rule absolute, and entered a decree against the Louisville and Nashville Railroad, condemning it to pay the judgment, subject to the set-off which had been pleaded in the answer to the rule, and this judgment was affirmed by the Court of Appeals of the State of Kentucky as a delay case. By an allowance of a writ of error the cause is now here for

review.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Civil Procedure > Eminent Domain Proceedings > Notices
[HN1] The *due process clause of the Fourteenth Amendment to the Constitution of the United States* does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
[HN2] Whether in fact an individual has a defense is not important. To assume that he has none, and therefore that he is not entitled to a day in court, is to assume against him the very point he may wish to contest. Manifestly, the principle can have no application in a case where there was notice.

LAWYERS' EDITION HEADNOTES:

Constitutional law -- due process of law -- bringing in defendant after judgment -- order to show cause as due process of law. --

Headnote:

1. The rendition of a judgment against one who was not served with process in the action or named as a party until after the original judgment was rendered, but was brought in subsequent thereto by an order to show cause, and condemned to pay the judgment, was not in violation of the provision as to due process of law in *U. S. Const. 14th Amend.*, where such party had voluntarily appeared in the cause and actively conducted the defence.

2. The mere fact that a proceeding to hold a party liable to a judgment is by rule to show cause does not conflict with due process under *U. S. Const. 14th Amend.*, for forms of procedure in the state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied.

3. One who actually appeared and made a defense in an action to which he was not technically a party cannot contend that, when he was brought in by rule to show cause after the judgment was rendered, and was condemned to pay it, he was denied due process of law because all right to defend had been cut off by the previous judgment, if he offered no defense which the court did not entertain.

SYLLABUS

The *due process clause of the Fourteenth Amendment to the Constitution of the United States* does not control mere forms of procedure in state courts, or regulate practice therein; and all its requirements are complied with provided that in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.

The mere fact that in this case the proceeding to hold the Louisville and Nashville Company liable was by rule does not conflict with due process under the *Fourteenth Amendment*, since forms of procedure in state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied.

Although the Louisville and Nashville Company appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character except its set-off was pleaded or suggested in any form, and this court cannot be called upon to conjecture that defences existed which were not made, and to decide that proceedings in a state court have denied due process of law because defences were denied when they were not prosecuted.

COUNSEL: Mr. Helm Bruce and Mr. James P. Helm for plaintiff in error. Mr. H. W. Bruce was on their brief.

Mr. John G. Simrall and Mr. Edmund F. Trabue for defendant in error. Mr. Temple Bodley, Mr. John C. Doolan, Mr. Benjamin F. Washer and Mr. James S. Pirtle were on their brief.

OPINION BY: WHITE

OPINION

[*236] [**622] [***750] MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

It is no longer open to contention that [HN1] *the due process clause of the Fourteenth Amendment to the Constitution of the United States* does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa Central Railway v. Iowa, 160 U.S. 389; Wilson v. North Carolina, 169 U.S. 586.*

[*237] The claim of the plaintiff in error (the Louisville and Nashville) is that the decree rendered against it did not constitute due process of law, first, because it had no notice of the suit, it not having been summoned as a party defendant; and, second, that as it was not made a nominal party defendant and served with process as such, it had no adequate opportunity to make defence. In support of the second contention various provisions of the Kentucky law have been referred to in the argument, from which it is deduced that the Louisville and Nashville would have been without right in the proceeding brought, not against it, but against the Cincinnati and Lexington, to make defences which may have appertained and been relevant to the Louisville and Nashville, and might not have related to the Cincinnati and Lexington, the party defendant on the record. But the answer to these contentions is that the necessary effect of the opinion and decree of the court of last resort of Kentucky, is to hold, first, as a matter of fact, that, although not a technical defendant, the Louisville and Nashville became voluntarily, in the name of the Cincinnati and Lexington, the real, although not the nominal, defendant in the cause, and during the long years of this protracted litigation was in legal effect an actor in the courts of Kentucky seeking, by every possible means, to defeat the claim of the plaintiff. The conclusions of fact found by the court of last resort of Kentucky are not subject to reexamination by this court. Clearly, also, the inevitable result of the conclusion of the Court of Appeals of Kentucky is that it was the duty of the Louisville and Nashville, having come in voluntarily in the cause to defend its interest, under the name of the technical [**623] defendant, if it had defences which were personal to itself, to have made such an appearance on its own behalf as to enable it to make them, and that the statutes of Kentucky not only authorized this course, but obliged the Louisville and Nashville to have followed it. Accepting as we do the interpretation placed by the courts of last resort of Kentucky on the law of that State, the contention of the plaintiff in error is at once demonstrated [***751] to be without merit. Besides the conclusiveness of what we have just said, there is another view which is equally decisive. The record shows no offer of any defence whatever, by [*238] the Louisville and Nashville, which was refused by the courts below. On the contrary, every defence made is shown to have been entertained, fully considered and to have been ultimately decided. The argument then reduces itself to this: That one who has voluntarily appeared in a cause and actively conducted the defence is to be held to have been denied, by the courts of the State, the right to make a defence which was never presented. Moreover, even if we put out of view altogether all the proceedings had in the original cause during the many years when the suit was pending, and confine our attention solely to the events which took place after the application for the rule to show cause, on the Louisville and Nashville, the same conclusion is rendered necessary. It is undoubted that the Louisville and Nashville was made a party defendant to the rule in the most technical sense, and was actually served. It made answer and asserted its set-off. The mere fact that the proceeding to hold it liable was by rule does not conflict with due process under the *Fourteenth Amendment*, for, as we have seen, forms of procedure in the state courts are not controlled by the *Fourteenth Amendment*, provided the fundamental rights secured by the amendment are not denied. But it is argued whilst it is true the effort by rule to enforce responsibility for the judgment did not violate the *Fourteenth Amendment*, and service of the rule was adequate notice, yet no opportunity to defend was afforded, because all right to defend had been cut off by the previous judgment. In effect it is asserted the rule summoned the corporation to show cause why it should not pay a judgment to which, under the previous decree, there was no right on its part to make any defence whatever. In other words, it is said the right to proceed by rule was upheld by the Kentucky court because the Louisville and Nashville was bound by the judgment and therefore the rule rested on an assumption which precluded the setting up of any defence to it. But the answer to this argument is plain. Although

the Louisville and Nashville appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character, except the set-off, was pleaded or suggested in any form whatever. The argument, therefore, [*239] asks us to say that the Louisville and Nashville in the proceeding in which it was duly served, and to which it responded and as to which it had its day in court, was deprived of defences which it never asserted, and that due process of law was not administered to it because it was unheard in respect to matters concerning which it made no claim. But this court cannot be called upon to conjecture that defences existed which were not made and to decide that proceedings in a state court have denied due process of law because defences were denied, when they were not presented. And especially must that be so where the court of last resort of the State, on review of all the proceedings, has held that full opportunity to make every defence was afforded. True it is that in *Rees v. City of Watertown, 19 Wall. 107, 123*, it was said: [HN2] "Whether in fact the individual has a defence . . . is not important. To assume that he has none, and therefore that he is not entitled to a day in court, is to assume against him the very point he may wish to contest." But this truism was stated with reference to a case where it was argued that a condemnation without notice could be justified on the assumption that if notice had been given no defence could have been made. Manifestly, the principle can have no application to a case where there was notice, and the presumption which we are asked to invoke is that although no defences were pressed they may have possibly existed.

Affirmed.

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MULLANE, SPECIAL GUARDIAN, v. CENTRAL HANOVER BANK & TRUST CO., TRUSTEE, ET AL.

No. 378

SUPREME COURT OF THE UNITED STATES

339 U.S. 306; 70 S. Ct. 652; 94 L. Ed. 865; 1950 U.S. LEXIS 2070

February 8, 1950, Argued
April 24, 1950, Decided

PRIOR HISTORY: APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

Overruling objections to the statutory notice to beneficiaries by publication authorized by *§ 100-c of the New York Banking Law*, a New York Surrogate's Court entered a final decree accepting an accounting of the trustee of a common trust fund established pursuant to that section. *73 N. Y. S. 2d 397*. This decree was affirmed by the Appellate Division of the Supreme Court of New York (see *274 App. Div. 772, 80 N. Y. S. 2d 127*) and the *Court of Appeals of New York (299 N. Y. 697, 87 N. E. 2d 73)*. On appeal to this Court, reversed, p. 320.

DISPOSITION: *299 N. Y. 697, 87 N. E. 2d 73*, reversed.

LexisNexis(R) Headnotes

Banking Law > Bank Activities > Bank Accounts > Trust Accounts > General Overview
[HN1] See *N.Y. Banking Law § 100-c(12)*.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Estate, Gift & Trust Law > Trusts > Modification & Termination
[HN2] Whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN3] The fundamental requisite of due process of law is the opportunity to be heard.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN4] An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

339 U.S. 306, *; 70 S. Ct. 652, **;
94 L. Ed. 865, ***; 1950 U.S. LEXIS 2070

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN5] When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN6] Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

SUMMARY:

A New York statute which permits trust companies to pool small trust estates into one common fund for investment administration also provides for notice, to interested beneficiaries, of a petition of such trust company for judicial settlement of its accounts by publication in a local newspaper, setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts, or funds.

A majority of the Supreme Court, consisting of seven of the Justices, held, in an opinion by Jackson, J., that the statutory provision for notice is not subject to due process objections in so far as it concerns beneficiaries whose interests or addresses are unknown to the trustee, but is subject to such objections as regards beneficiaries whose whereabouts and interests are known. It was also stated that notice by mail would be sufficient.

Burton, J., dissented, expressing the view that whether or not further notice to beneficiaries should supplement the statutory notice and representation is properly within the discretion of the state.

Douglas, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW, §786

necessity of notice and hearing -- as depending upon distinctions between actions in rem and those in personam. --

Headnote:[1]

The due process requirements of the *Fourteenth Amendment* as regards notice and hearing do not depend upon a distinction between actions in rem and those in personam, however useful such a distinction may be in many branches of the law, or on other issues.

[***LEdHN2]

CONSTITUTIONAL LAW, §778.5

due process -- power to close trusts -- as against nonresidents. --

Headnote:[2]

In providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts, a state has power to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

[***LEdHN3]

CONSTITUTIONAL LAW, §786

due process -- necessity of notice and hearing. --

Headnote:[3]

The due process clause requires at a minimum that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

[***LEdHN4]

CONSTITUTIONAL LAW, §803.5

due process -- notice and hearing -- settlement of trust accounts. --

Headnote:[4]

Proceedings for the judicial settlement of accounts of a trust company which has established a common trust fund under state law permitting the pooling of small trust estates into one fund for investment administration, must measure up to the standards of due process, as regards notice and hearing.

[***LEdHN5]

CONSTITUTIONAL LAW, §788.5

due process -- personal service within jurisdiction. --

Headnote:[5]

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding to satisfy the requirements of due process.

[***LEdHN6]

CONSTITUTIONAL LAW, §790

due process -- constructive service. --

Headnote:[6]

The Supreme Court of the United States has not committed itself to any formula determining when constructive notice may be utilized, or what test it must meet, to satisfy the requirements of due process.

[***LEdHN7]

CONSTITUTIONAL LAW, §787

due process -- sufficiency of notice. --

Headnote:[7]

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

[***LEdHN8]

CONSTITUTIONAL LAW, §787

sufficiency of notice -- criterion. --

Headnote:[8]

The criterion whether a statutory provision for notice meets the requirements of due process is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.

[***LEdHN9]

CONSTITUTIONAL LAW, §787

due process -- sufficiency of notice. --

Headnote:[9]

When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness, and hence the constitutional validity, of any statutory method of notice may be defeated on the ground that it is in itself reasonably certain to inform those affected, or, where conditions preclude reasonable certainty of actual receipt of notice, that the form chosen is not substantially less likely to bring home notice than others of the feasible and customary substitutes.

[***LEdHN10]

CONSTITUTIONAL LAW, §790

due process -- service by publication. --

Headnote:[10]

In an appropriate case the due process requirement of notice may be satisfied by service by publication as notification supplemental to other action which in itself may reasonably be expected to convey a warning.

[***LEdHN11]

CONSTITUTIONAL LAW, §790

due process -- service by publication -- settlement of trust accounts. --

Headnote:[11A][11B]

A statutory provision for notice, by publication in a local newspaper, of a petition for judicial settlement of its accounts filed by a trust company which has established a common trust fund under state law permitting the pooling of small trust estates into one fund for investment administration, satisfies the due process requirement of notice in regard to beneficiaries whose interests or whereabouts cannot be ascertained with due diligence by the trust company, even though the statute requires only a publication setting forth the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds. On the other hand, while as regards beneficiaries whose whereabouts and interests are known to the trust company notice by mail would be sufficient, due process is not afforded to them by the statutory notice by publication.

[***LEdHN12]

NOTICE, §3

sufficiency of personal service without jurisdiction. --

Headnote:[12]

Personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack.

SYLLABUS

A trust company in New York which had exclusive management and control of a common trust fund established by it under *§ 100-c of the New York Banking Law* petitioned under that section for a judicial settlement of accounts which would be binding and conclusive as to any matter set forth therein upon everyone having any interest in the common fund or in any participating trust. In this common fund the trust company had invested assets of numerous small trusts of which it was trustee and of which some of the beneficiaries were residents and some nonresidents of the State. The only notice of this petition given beneficiaries was by publication in a local newspaper pursuant to *§ 100-c (12)*. *Held:*

1. Whether such a proceeding for settlement of accounts be technically *in personam*, *in rem*, or *quasi in rem*, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is such as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard. *Pp. 311-313.*

2. The statutory notice by publication is sufficient as to any beneficiaries whose interests or addresses are unknown to the trustee, since there are no other means of giving them notice which are both practicable and more effective. *Pp. 313-318.*

3. Such notice by publication is not sufficient under the *Fourteenth Amendment* as a basis for adjudication depriving of substantial property rights known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record with the trust company. *Pp. 318-320.*

COUNSEL: Kenneth J. Mullane argued the cause and filed a brief for appellant.

Albert B. Maginnes argued the cause for the Central Hanover Bank & Trust Co., appellee. With him on the brief was J. Quincy Hunsicker, 3rd.

James N. Vaughan submitted on brief for Vaughan, appellee.

Peter Keber and C. Alexander Capron filed a brief for the New York State Bankers Association, as amicus curiae, urging affirmance.

JUDGES: Vinson, Black, Reed, Frankfurter, Jackson, Burton, Clark, Minton; Douglas took no part in the consideration or decision of this case.

OPINION BY: JACKSON

OPINION

[*307] [**654] [***869] MR. JUSTICE JACKSON delivered the opinion of the Court.

This controversy questions the constitutional sufficiency of notice to [***870] beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York

Banking Law. The New York Court of Appeals considered and overruled objections that the statutory notice contravenes requirements of the *Fourteenth Amendment* and that by allowance of the account beneficiaries were deprived of property without due process of law. *299 N. Y. 697, 87 N. E. 2d 73.* The case is here on appeal under *28 U. S. C. § 1257.*

Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, the District of Columbia and some [*308] thirty states other than New York have permitted pooling small trust estates into one fund for investment administration. The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.

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* *Ala. Code Ann., 1940*, Cum. Supp. 1947, tit. 58, §§ 88 to 103, as amended, Laws 1949, Act 262; Ariz. Code Ann., 1939, Cum. Supp. 1949, §§ 51-1101 to 51-1104; Ark. Stat. Ann. 1947, §§ 58-110 to 58-112; Cal. Bank. Code Ann., Deering, 1949, § 1564; Colo. Stat. Ann., 1935, Cum. Supp. 1947, c. 18, §§ 173 to 178; Conn. Gen. Stat. 1949 Rev., § 3805; Del. Rev. Code, 1935, § 4401, as amended, Laws, 1943, c. 171, Laws 1947, c. 268; (D. C.) 63 Stat. 938; Fla. Stat., 1941, §§ 653.29 to 655.34; Ga. Code Ann., 1937, Cum. Supp. 1947, §§ 109-601 to 109-622; Idaho Code Ann., 1949, Cum. Supp. 1949, §§ 68-701 to 68-701 to 68-703; Ill. Rev. Stat., 1949, c. 16 1/2, §§ 57 to 63; Ind. Stat. Ann., Burns, 1950, §§ 18-2009 to 18-2016; *Ky. Rev. Stat., 1948, § 287.230*; La. Gen. Stat. Ann., 1939, § 9850.64; Md. Ann. Code Gen. Laws, 1939, Cum. Supp. 1947, art. 11, § 62A; Mass. Ann. Laws, 1933, Cum. Supp. 1949, c. 203A; Mich. Stat. Ann., 1943, §§ 23.1141 to 23.1153; *Minn. Stat., 1945, § 48.84*, as amended, Laws 1947, c. 234; N. J. Stat. Ann., 1939, Cum. Supp. 1949, §§ 17:9A-36 to 17:9A-46; N. C. Gen. Stat., 1943, §§ 36-47 to 36-52; Ohio Gen. Code Ann. (Page, 1946) §§ 715 to 720, 722; Okla. Stat., 1941, Cum. Supp. 1949, tit. 60, § 162; Pa. Stat. Ann., 1939, Cum. Supp. 1949, tit. 7, §§ 819-1109 to 819-1109d; So. Dak. Laws 1941, c. 20; Tex. Rev. Civ. Stat. Ann., 1925, Cum. Supp. 1949, art. 7425b-48; Vt. Stat., 1947 Rev., § 8873; Va. Code Ann., 1950, §§ 6-359 to 6-376; Wash. Rev. Stat. Ann., Supp. 1943, §§ 3388 to 3388-6; W. Va. Code Ann., 1949, § 4219(1) *et seq.*; *Wis. Stat., 1947, § 223.055.*

Statutory authorization for the establishment of such common trust funds is provided in the *New York Banking Law, § 100-c* (c. 687, L. 1937, as amended by c. 602, L. 1943 and c. 158, L. 1944). Under this Act a trust company may, with approval of the State Banking Board, establish a common fund, and, within prescribed limits, [*309] invest therein the assets of an unlimited number of estates, trusts or other funds of which it is trustee. Each participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself [**655] or any affiliates. Provisions are made for accountings twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance [***871] with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts, approximately half *inter vivos* and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.

The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of *N. Y. Banking Law § 100-c (12)*: [HN1] "After filing such petition [for judicial settlement of its account] the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week [*310] for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund." This the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.

At the time the first investment in the common fund was made on behalf of each participating estate, however, the trust company, pursuant to the requirements of *§ 100-c (9)*, had notified by mail each person of full age and sound mind whose name and address were then known to it and who was "entitled to share in the income therefrom . . . for] . . . who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice." Included in the notice was a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts.

Upon the filing of the petition for the settlement of accounts, appellant was, by order of the court pursuant to *§ 100-c (12)*, appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.

[*311] Appellant appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the *Fourteenth Amendment*, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate holding that the notice required and given was sufficient. *72 N. Y. S. 2d 397.* A final decree accepting the accounts has been entered, affirmed by the Appellate Division of the Supreme Court, *275 App. Div. 769, 88 N. Y. S. 2d 507*, and by the Court of Appeals of the State of New York. *299 N. Y. 697, 87 N. E. 2d 73.*

The effect of this decree, as held below, is to settle "all questions respecting [**656] the management of the common fund." We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper [***872] management of the common trust fund during the period covered by the accounting is settled and wholly terminated by the decree. See *Meister of Hoagland, 194 Misc. 853, 811-812, 74 N. Y. S. 2d 136, 164*, aff'd *272 App. Div. 1040, 74 N. Y. S. 2d 911*, aff'd *297 N. Y. 920, 79 N. E. 2d 746*; *Matter of Bank of New York, 180 Misc. 455, 470, 67 N. Y. S. 2d 444, 457*; *Matter of Security Trust Co. of Rochester, Id.* 748, 760, 20 N. Y. S. 2d 260, 271; *Matter of Continental Bank & Trust Co., Id.* 795, 797, 67 N. Y. S. 2d 856, 857-858.

We are met at the outset with a challenge to the power of the State — the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is not *in personam* in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of *Pennoyer v. Neff, 95 U.S. 714*, the Surrogate [*312] is without jurisdiction as to nonresidents upon whom personal service of process was not made.

Distinctions between notions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. Buckland and McNair, *Roman Law and Common Law*, 66; Bunick, *Principles of Roman Law and Their Relation to Modern Law*, 298. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not

required because the action was *in rem*. See cases collected in *Freeman on Judgments*, §§ 1517 *et seq.* (5th ed.).

[***LEdHR1] [1] [***LEdHR2] [2]Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem*, or more indefinitely *quasi in rem*, or more vaguely still, "in the nature of a proceeding *in rem*." It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*. But in any event we think that the requirements of the *Fourteenth Amendment to the Federal Constitution* do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding [*313] upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, [HN2] whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

[***LEdHR3] [3]Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries in contest. Many controversies have raged about the cryptic and abstract words [***873] of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice [**657] and opportunity for hearing appropriate to the nature of the case.

[***LEdHR4] [4]In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are permanently subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

[***LEdHR5] [5]Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which [*314] would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State we must balance the individual interest sought to be protected by the *Fourteenth Amendment*. This is defined by our holding that "[HN3] The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean, 234 U.S. 385, 394.* This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

[***LEdHR6] [6]The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

[***LEdHR7] [7] [***LEdHR8] [8][HN4] An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer, 311 U.S. 457; Grannis v. Ordean, 234 U.S. 385; Priest v. Las Vegas, 232 U.S. 604; Roller v. Holly, 176 U.S. 398.* The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable time for those interested to make their

appearance. *Roller v. Holly, supra*, and *cf. Chandler v. Farris, 214 U.S. 71.* But if with due regard for the practicalities and peculiarities of the case these conditions [*315] are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." [***874] *American Land Co. v. Zeiss, 219 U.S. 47, 67;* and see *Blinn v. Nelson, 222 U.S. 1, 7.*

[***LEdHR9] [9]But [HN5] when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess v. Pawloski, 274 U.S. 352*, with *Wuchter v. Pizzutti, 276 U.S. 13*, [**658] or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a fiction.

[*316] [***LEdHR10] [10]Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property selzes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, *cf. Anderson National Bank v. Luckett, 321 U.S. 233; Security Savings Bank v. California, 263 U.S. 282*, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Bullard v. Hunter, 204 U.S. 241; Hulling v. Kaw Valley R. Co., 130 U.S. 559.* As phrased long ago by Chief Justice Marshall in *The Mary, 9 Cranch 126, 144*, "It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it."

In the case before us there is, of course, no abandonment. On the other hand these beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who is the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not [***873] even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely transferred [*317] from the trustee to the guardian, economy would not be served and more likely the cost would be increased.

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. *Cunnius v. Reading School District, 198 U.S. 458; Blinn v. Nelson, 222 U.S. 1;* [**659] and see *Jacob v. Roberts, 223 U.S. 261.*

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be

ascertained seems clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the [*318] name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

[***LEdHR1A] [1A]Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. [HN6] Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. *Cf. Wachter v. Pizzuti, supra.* Certainly sending them a copy of the statute months and perhaps years in advance does not answer [***876] this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

[***LEdHR1B] [1B]We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by [*319] reasons of delay if not of expense, seriously interfere with the proper administration of the fund. Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it may lack. However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any [**660] objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done." *Blinn v. Nelson, supra, 7.*

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world

accepts for its own purposes. In few, if any, will it be satisfied with [*320] less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald v. Mabee, 243 U.S. 90, 91.*

[***LEdHR1B] [1B]We hold that the notice of judicial settlement of accounts required by the *New York Banking Law § 100-c (12)* is incompatible with the requirements of the *Fourteenth Amendment* as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings [***877] not inconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

DISSENT BY: BURTON

DISSENT

MR. JUSTICE BURTON, dissenting.

These common trusts are available only when the instruments creating the participating trusts permit participation in the common fund. Whether or not further notice to beneficiaries should supplement the notice and representation here provided is properly within the discretion of the State. The Federal Constitution does not require it here.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUVENILE MALE, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUVENILE MALE, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUVENILE MALE, Defendant-Appellant.

No. 09-30330, No. 09-30273, No. 09-30365

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

670 F.3d 999; 2012 U.S. App. LEXIS 1304

September 21, 2011, Argued and Submitted, San Francisco, California
January 25, 2012, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Juvenile v. United States, 2012 U.S. LEXIS 6621 (U.S., Oct. 1, 2012)*

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Montana. D.C. No. 4:09-cr-00064-SEH-1. District of Montana. D.C. No. 1:09-cr-00034-RFC-1. District of Montana. Sam E. Haddon, District Judge, Presiding. Appeal from the United States District Court for the District of Montana. D.C. No. 4:09-cr-00071-SEH-1. District of Montana. Richard F. Cebull, Chief District Judge, Presiding.

DISPOSITION: AFFIRMED.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

[HN1] A successful prosecution under the Federal Juvenile Delinquency Act (FJDA), *18 U.S.C.S. § 5031 et seq.*, results in a civil adjudication of status, not a criminal conviction. So long as a juvenile remains within the auspices of the FJDA for sentencing, he or she is presumptively capable of rehabilitation, and any sentence imposed by a district court must accord with this presumption.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

[HN2] *18 U.S.C.S. § 5032* provides that any proceedings against an alleged juvenile delinquent may be convened at any time and place within the district, in chambers or otherwise. *18 U.S.C.S. § 5038(a)* further provides that throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. *18 U.S.C.S. § 5038(a)*. Information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege, except for in limited circumstances relating to court proceedings, treatment, law enforcement investigation, or national security. Moreover, the statute specifies that the identity and image of the juvenile may not be disclosed even where proceedings are opened or documents are released: neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding. *18 U.S.C.S. § 5038(e)*.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Children > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

[HN3] The Sex Offender Registration and Notification Act (SORNA), *42 U.S.C.S. § 16901 et seq.*, establishes a comprehensive national system for the registration of those offenders. SORNA defines sex offender as an individual who was convicted of a sex offense. *42 U.S.C.S. § 16911(1)*. The statute also specifies that: The term convicted or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in *section 2241 of* Title 18), or was an attempt or conspiracy to commit such an offense. *42 U.S.C.S. § 16911(8)*. Under *18 U.S.C. § 2241(c)*, any person who knowingly engages in a sexual act with another person who has not attained the age of 12 years may be convicted of aggravated sexual abuse. Any individual convicted of violating *18 U.S.C. § 2241* is classified as a Tier III sex offender under SORNA. *42 U.S.C.S. § 16911(4)*.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

[HN4] Under the comprehensive national registration system of the Sex Offender Registration and Notification Act (SORNA), *42 U.S.C.S. § 16901 et seq.*, sex offenders must register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. *42 U.S.C.S. § 16913(a)*. The offender must appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry. *42 U.S.C.S. § 16916*. Each jurisdiction must make public the contents of its sex offender registry, including each registrant's name, address, photograph, criminal history, and status of parole, probation, or supervised release. *42 U.S.C.S. §§ 16914(b), 16918(a)*. Tier III sex offenders must register with the applicable jurisdiction every 3 months. The registration period for a Tier III offender is for life, *42 U.S.C.S § 16915(a)(3)*, with the possibility of a reduced period of 25 years if the offender maintains a clean record, *42 U.S.C.S. § 16915(b)(2)-(3)*.

Constitutional Law > The Judiciary > Case or Controversy > Mootness > General Overview

[HN5] For a case or controversy to be justiciable under U.S. Const. art. III, it must remain extant at all stages of review, not merely at the time the complaint is filed. Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.

Constitutional Law > The Judiciary > Case or Controversy > Mootness > General Overview
Criminal Law & Procedure > Appeals > Procedures > General Overview

[HN6] In criminal cases, a defendant wishing to continue an appeal after the expiration of his or her sentence must suffer some continuing injury or collateral consequence sufficient to satisfy U.S. art. III.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law

[HN7] An appellate court reviews a district court's construction or interpretation of a statute de novo.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview
Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

[HN8] The Federal Juvenile Delinquency Act (FJDA), *18 U.S.C.S. § 5031 et seq.*, provides that unless a juvenile who is taken into custody is prosecuted as an adult . . . neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding. *18 U.S.C.S. § 5038(e)*. The FJDA further provides that information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. *18 U.S.C.S. § 5038(a)*. The Sex Offender Registration and Notification Act (SORNA), *42 U.S.C.S. § 16901 et seq.*, however, requires that a sex offender registry include the name, address, physical description, criminal history and status of parole, probation, or supervised release, current photograph, and other identifying information. *42 U.S.C.S. § 16914*. SORNA further requires that each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. *42 U.S.C.S. § 16918(a)*. Because it is clear that the government's public release of juvenile records authorized by SORNA would have been prohibited under

the FIDA prior to the passage of SORNA, the two statutes conflict.

Governments > Legislation > Interpretation
[HN9] Where two statutes conflict, the later-enacted, more specific provision generally governs.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview
Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration
[HN10] The Sex Offender Registration and Notification Act (SORNA), *42 U.S.C.S. § 16901 et seq.*, unambiguously directs juveniles over the age of 14 convicted of certain aggravated sex crimes to register, and thus carves out a narrow category of juvenile delinquents who must disclose their juvenile crimes by registering as a sex offender. For all other juvenile delinquents, the confidentiality provisions of the Federal Juvenile Delinquency Act, *18 U.S.C.S. § 5031 et seq.*, remain in force.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law
[HN11] An appellate court reviews the constitutionality of a statute de novo.

Constitutional Law > Equal Protection > Level of Review
[HN12] The *Equal Protection Clause of the Fourteenth Amendment* applies strict scrutiny if the aggrieved party is a member of a protected or suspect class, or otherwise suffers the unequal burdening of a fundamental right. Government actions that do not involve suspect classifications will be upheld if they are rationally related to a legitimate state interest.

Constitutional Law > Equal Protection > Scope of Protection
[HN13] Age is not a suspect classification under the *Equal Protection Clause*.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
[HN14] The *Eighth Amendment* mandates that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. The bar for cruel and unusual punishment is high.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege
[HN15] The *Fifth Amendment* protects a person from being compelled in any criminal case to be a witness against himself. *U.S. Const. amend. V*. This protection extends not only to criminal proceedings, but any proceeding in which the answers might incriminate the individual in a future criminal proceeding. The *Fifth Amendment* privilege may not be invoked to resist compliance with a regulatory regime constructed to affect the State's public purposes unrelated to the enforcement of its criminal laws.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege
Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Challenges
[HN16] The registration required under the Sex Offender Registration and Notification Act, *42 U.S.C.S. § 16901 et seq.*, does not subject the defendants to any additional criminal exposure or liability. Rather, it requires only an acknowledgment that they have been previously adjudicated or convicted of a crime. The *Fifth Amendment* is designed to protect against prospective incrimination. Other circuits have also rejected *Fifth Amendment* challenges to sex offender registration.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN17] The Due Process Clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them. In a substantive due process analysis, an appellate court must first consider whether the statute in question abridges a fundamental right. If it does, the statute will be subject to strict scrutiny and is invalidated unless it is narrowly tailored to serve a compelling state interest. If not, the statute need only bear a reasonable relation to a legitimate state interest to justify the action.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN18] The fundamental rights protected by substantive due process are those personal activities and decisions that the U.S. Supreme Court has identified as so deeply rooted in history and tradition, or so fundamental to the concept of constitutionally ordered liberty, that they are protected by the *Fourteenth Amendment*. Those rights are few, and include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
[HN19] An appellate court analyzes a procedural due process claim in two steps. The first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN20] Adverse publicity or harm to the reputation of sex offenders does not implicate a liberty interest for the purposes of due process analysis.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN21] Constitutionally protected liberty interests can be created where a law sets forth substantive predicates to govern official decision making and contains explicitly mandatory language that mandates a particular outcome.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Challenges
[HN22] Additional process is only necessary where it gives a sex offender the ability to prove or disprove facts related to the applicability of the registration requirement. In other words, where the law's requirements turn on an offender's conviction alone--a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest--no additional process is required for due process.

Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview
[HN23] A party has waived an argument where it fails to raise it either in the district court or in his brief on appeal, and mentioned it for the first time at oral argument.

Criminal Law & Procedure > Appeals > Procedures > Briefs
[HN24] An appellate court reviews only issues that are argued specifically and distinctly in a party's opening brief.

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JUDGES: Before: Kim McLane Wardlaw, Ronald M. Gould, and Jay S. Bybee, Circuit Judges. Opinion by Judge Wardlaw.

OPINION BY: Kim McLane Wardlaw

OPINION

[*1003] WARDLAW, Circuit Judge:

Three juvenile defendants, each of whom is a member of an Indian Tribe and who pleaded true to a charge of aggravated sexual abuse with children, appeal their conditions of probation or supervision requiring registration under the Sex Offender Registration (**2] and Notification Act (SORNA), *42 U.S.C. § 16901 et seq.* Defendants argue that SORNA's registration requirement contravenes the confidentiality provisions of the Federal Juvenile Delinquency Act (FJDA), *18 U.S.C. § 5031* et seq., and also challenge its constitutionality. We have jurisdiction pursuant to *18 U.S.C. § 1291* and *18 U.S.C. § 3742*. Because we conclude that Congress, in enacting SORNA, intentionally carved out a class of juveniles from the FJDA's confidentiality provisions, and that

SORNA's registration requirement is constitutionally sound, we affirm the district courts' imposition of the sex offender registration conditions.

I. Background

These consolidated appeals -- *United States v. Juvenile Male (I.M.T.D.), United States v. Juvenile Male (L.L.S.),* and *United States v. Juvenile Male (M.M.R.)* -- involve juvenile proceedings against three Native American who pleaded true to committing aggravated sexual abuse while children. As a condition of probation or supervision, each was required to register as a sex offender pursuant to SORNA.

A. Juvenile Defendants

1. I.M.T.D.

I.M.T.D., an enrolled member of the Fort Peck Tribes, was charged with committing an act of juvenile delinquency pursuant [**3] to *18 U.S.C. § 5031 et seq.* for offenses committed in July 2008. I.M.T.D. was born on June 21, 1991 and thus was seventeen years old at the time of the offense and is twenty years old at present. If I.M.T.D. had been an adult at the time of the offense, the charge against him would have constituted aggravated sexual abuse with children in violation of *18 U.S.C. §§ 1153(a)* and *2241(c)*.

On August 5, 2009, I.M.T.D. pleaded true to the information without entering into a plea agreement. On August 25, 2009, the district court entered a disposition sentencing I.M.T.D. to a three-year term of probation, subject to several conditions. As special conditions, the district court ordered I.M.T.D. to "comply with the requirements of the Sex Offender Registration and Notification Act;" "comply with Sexual Offender Registration requirements for convicted offenders in any state in which [I.M.T.D.] resides;" and "register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which [I.M.T.D.] resides, is employed, and is a student."

2. L.L.S.

L.L.S., an enrolled member of the Northern Cheyenne Tribe, was charged with committing an act of juvenile delinquency pursuant [**4] to *18 U.S.C. § 5031 et seq.* for offenses committed in approximately January or February 2005 and September 2007. L.L.S. was born on January 19, 1991 and thus was between thirteen [*1003] and sixteen years old at the time of the offenses and is twenty years old at present. Like I.M.T.D., if L.L.S. had been an adult at the time of the offenses, the charge against him would have constituted aggravated sexual abuse with children in violation of *18 U.S.C. §§ 1153(a)* and *2241(c)*.

On April 30, 2009, L.L.S. pleaded true to the information pursuant to a plea agreement. The plea agreement states that "by pleading true pursuant to this agreement [L.L.S.] is waiving all the rights set forth in . . . paragraph [nine]," however, paragraph nine does not mention sex offender registration or any condition of supervision. Separately, the plea agreement states that L.L.S. "has been advised and understands, that under the Sex Offender Registration and Notification Act, a federal law, the defendant must register and keep the registration current."

At the June 19, 2009 sentencing hearing, L.L.S.'s counsel noted that the question of "whether or not a juvenile should be required to register underneath . . . SORNA" [**5] was unresolved and pending before the Ninth Circuit. The district judge stated that "the issue that's before [the Ninth Circuit] is whether you can require a juvenile to register under SORNA at all . . . . And that issue, as far as I'm concerned, is preserved by you."

On June 22, 2009, the district court sentenced L.L.S. to official detention for three years, recommending that L.L.S. be placed in a therapeutic environment for youthful offenders, and ordered two years of juvenile delinquent supervision following his release from detention, subject to a number of special conditions. As special conditions, the district court ordered L.L.S. to "comply with the requirements of the Sex Offender Registration and Notification Act" and "register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which [L.L.S.] resides, is employed, and is a student."

3. M.M.R.

M.M.R., a member of an Indian Tribe, was charged with committing acts of juvenile delinquency pursuant to *18 U.S.C. § 5031 et seq.* for offenses committed on November 13, 2006 on the Rocky Boy's Indian Reservation. M.M.R. was born on September 17, 1994 and thus was fourteen years old at the time of [**6] the offense and is seventeen years old at present. As with I.M.T.D. and L.L.S., if M.M.R. had been an adult at the time of the offenses, the charge against him would have constituted aggravated sexual abuse with children in violation of *18 U.S.C. §§ 1153(a)* and *2241(c)*.

On August 27, 2009, M.M.R. pleaded true to the information without entering into a plea agreement. At the September 18, 2009 sentencing hearing, M.M.R.'s counsel objected to the imposition of SORNA's registration requirements on M.M.R. The district court agreed to withhold entry of a final order pending its review of supplemental briefing on the SORNA issue. Both the government and M.M.R. filed supplementary memoranda in which M.M.R. argued "that he should not have to register under SORNA's sex offender registration requirements because M.M.R. is a juvenile and his registration would be anathema to the fundamental purpose of the FJDA."

On September 28, 2009, the district court entered a disposition sentencing M.M.R. to two years of official detention, recommending that M.M.R. be placed in a therapeutic environment for youthful offenders. The district court ordered M.M.R. to enter juvenile delinquent supervision following [**7] his release from detention until September 17, 2012, his eighteenth [*1004] birthday, subject to a number of special conditions. As special conditions, the district court ordered M.M.R. to "comply with Sexual Offender Registration requirements for convicted offenders in any state in which [M.M.R.] resides" and "register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which [M.M.R.] resides, is employed, and is a student."

B. The Federal Juvenile Delinquency Act ("FJDA")

The FJDA, *18 U.S.C. § 5031 et seq.*, "governs the detention and disposition of juveniles charged with delinquency." *United States v. Three Juveniles, 61 F.3d 86, 87 (1st Cir. 1995)*. First enacted in 1938, the FJDA was intended "to provide for the care and treatment of juvenile delinquents," *id. at 88* (quoting H.R. Rep. No. 75-2617, at 1 (1938)), in recognition of significant differences between juvenile delinquents and adult offenders. As Congress later noted in a committee report on proposed amendments to the FJDA, "[o]ne objective must be . . . to minimize the youngster's penetration into all negative labeling, institutional processes . . . . [a]t each critical step, we should exhaust [**8] the less rejecting, the less stigmatizing resources before taking the next expulsive step." S. Rep. No. 93-1011, at 24 (1974) (internal quotation marks omitted).

We have concluded that "the purpose of the FJDA is to enhance the juvenile system by removing juveniles from the ordinary criminal justice system and by providing a separate system of "treatment" for them." *United States v. Juvenile, 347 F.3d 778, 785 (9th Cir. 2003)* (quoting *United States v. Pregnillo-Zamora, 626 F.2d 99, 101 (9th Cir. 1980)*). These safeguards are necessary "in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation." *United States v. Doe, 94 F.3d 532, 536 (9th Cir. 1996)* (internal quotation marks omitted). Thus[I]N[1] a "successful prosecution under the Act results in a civil adjudication of status, not a criminal conviction." *Juvenile, 347 F.3d at 785* (quoting *United States v. Doe, 53 F.3d 1081, 1083 (9th Cir. 1995)*). "[S]o long as a juvenile remains within the auspices of the FJDA for sentencing, he or she is presumptively capable of rehabilitation, and any sentence imposed by a district court must accord with this presumption." *Id.*

The FJDA includes a number [**9] of provisions to ensure that information about juvenile delinquency proceedings remains safeguarded.[2][2] *18 U.S.C. § 5032* provides that "any proceedings against" an alleged juvenile delinquent "may be conveyed at any time and place within the district, in chambers or otherwise." *18 U.S.C. § 5038(a)* further provides that "[t]hroughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons." *18 U.S.C. § 5038(a)*. "[I]nformation about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege," except for in limited circumstances relating to court proceedings, treatment, law enforcement investigation, or national security. *Id.* Moreover, the statute specifies that the identity and image of the juvenile may not be disclosed even when proceedings are opened or documents are released: "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." *18 U.S.C. § 5038(e)*.

C. The Sex Offender Registration and Notification Act ("SORNA")

On July 27, 2006, Congress [**10] enacted the Adam Walsh Child Protection and Safety [*1005] Act,

42 U.S.C. § 16901 et seq., which includes the Sex Offender Registration and Notification Act ("SORNA"). Congress enacted SORNA "[i]n order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators." *42 U.S.C. § 16901.*[HN3] SORNA thus "establishes a comprehensive national system for the registration of those offenders." *Id.*

SORNA defines "sex offender" as "an individual who was convicted of a sex offense." *42 U.S.C. § 16911(1).* The statute also specifies that:

> The term "convicted" or a variant thereof, used with respect to a sex offense, *includes adjudicated delinquent as a juvenile for that offense*, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in *section 2241* of Title 18), or was so attempt or conspiracy to commit such an offense.

42 U.S.C. § 16911(8) (emphasis added). Under *18 U.S.C. § 2241(a)*, any person who "knowingly engages in a sexual act with another person who has not attained the age of 12 years" may be convicted of [**11] aggravated sexual abuse. *Id.* Any individual convicted of violating *18 U.S.C. § 2241* is classified as a "Tier III sex offender" under SORNA. *42 U.S.C. § 16911(4).*[1]

> 1 All three defendants were over the age of 14 when the alleged offenses occurred, and each pleaded true to the information for committing an act of juvenile delinquency for what would have been a violation of *18 U.S.C. § 2241*. Under the specific terms of SORNA, they thus qualify as "Tier III" sex offenders.

[HN4] Under SORNA's comprehensive national registration system, sex offenders must "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." *42 U.S.C. § 16913(a).* The offender must "appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry." *42 U.S.C. § 16916.* Each jurisdiction must make public the contents of its sex offender registry, including each registrant's name, address, photograph, criminal history, and status of parole, probation, or supervised release. *42 U.S.C. §§ 16914(b), 16918(a).* Tier III sex offenders must register with the applicable jurisdiction [**12] every 3 months. *Id.* The registration period for a Tier III offender is for life, *42 U.S.C. § 16915(a)(3)*, with the possibility of a reduced period of 25 years if the offender maintains a clean record, *42 U.S.C. § 16915(b)(2)-(3).*

II. Mootness

[HN5] For a case or controversy to be justiciable under Article III, it must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* (internal quotation marks omitted). "[T]hroughout the litigation," the party seeking relief "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)* (quoting *Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)*).[2]

> 2 The Supreme Court has recognized "numerous exceptions to mootness." *Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1141 (9th Cir. 2005)* (en banc) (W. Fletcher, J., dissenting). These exceptions include cases involving a party that voluntarily ceases the offending conduct, but remains "free to return to his old ways," *United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)*, wrongs [**13] that are "capable of repetition, yet evading review," *Moore v. Ogilvie, 394 U.S. 814, 816, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969)* (internal quotation marks omitted), and class action suits where the named plaintiff's case is moot, *Sosna v. Iowa, 419 U.S. 393, 399-401, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)*. Because we conclude that the consolidated appeals before us are not moot, we need not analyze any of these exceptions.

[*1006] In *United States v. Juvenile Male (Juvenile Male II), 131 S. Ct. 2860, 180 L. Ed. 2d 811 (2011), vacating 590 F.3d 924 (9th Cir. 2010)*, the Supreme Court found that an appeal of a similar sex offender registration condition was moot because the order of juvenile supervision imposing the condition had expired

prior to the Ninth Circuit's decision.[3] *Id. at 2864.* The defendant in *Juvenile Male II* pleaded true to charges that he engaged in sexual acts that, if he had been an adult, would have constituted aggravated sexual assault. *Id. at 2862* (citing *18 U.S.C. §§ 1153(a), 2241(a)*). The defendant was sentenced to official detention followed by a period of juvenile supervision, with the condition that he register as a sex offender, until his twenty-first birthday. *Id.* Defendant challenged the registration condition, but while his appeal was pending before [**14] us, he turned twenty-one and the supervision order requiring him to register as a sex offender expired. *Id. at 2863.* The Supreme Court found that the expiration of the order rendered the appeal moot, because the defendant was "no longer subject to the sex-offender-registration condition that he sought to challenge on appeal." *Id. at 2864.*

> 3 The Ninth Circuit's vacated opinion in *United States v. Juvenile Male, 590 F.3d 924*, addressed the retroactive application of SORNA's registration requirement to persons adjudicated delinquent before SORNA was enacted by virtue of the Attorney General's promulgation of *28 C.F.R. § 72.3* pursuant to Congress's delegation of authority in *42 U.S.C. § 16913(d).*

[HN6] In criminal cases, a defendant wishing to continue an appeal after the expiration of his or her sentence must suffer some "continuing injury" or "collateral consequence" sufficient to satisfy Article III. *See Spencer, 523 U.S. at 7-8*: Accordingly, to determine whether there was an ongoing "collateral consequence," the Court, in *United States v. Juvenile Male (Juvenile Male I), 130 S. Ct. 2518, 177 L. Ed. 2d 64 (2010)*, had certified a question to the Montana Supreme Court, inquiring whether

> [R]espondent's duty to remain [**15] registered as a sex offender under Montana law [was] contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions?

Id. at 2519-20 (citations omitted). The Montana Supreme Court responded that the "state law duty to remain registered as a sex offender is not contingent upon the validity of the conditions of his federal supervision order, but is an independent requirement of Montana law." *Juvenile Male II, 131 S. Ct. at 2863* (internal quotation marks omitted). The U.S. Supreme Court then concluded, on the ground that any decision an appellate court could make would have no effect, not even on the state registration requirement, that the "Ninth Circuit lacked the authority under Article III to decide this case on the merits." *Id. at 2865.*

The government argues that the three consolidated cases under review here [*1007] are similarly moot because the defendants "are required to register independently under Montana state law regardless of any decision by this [**16] Court addressing their SORNA obligations under federal law." We disagree. First, each of the juvenile defendants in this case is currently subject to an unexpired condition of his release or supervision requiring sex offender registration under SORNA. Indeed, the conditions requiring registration will remain in effect until August 23, 2012 for I.M.T.D., September 17, 2012 for M.M.R., and March 2014 for L.L.S. Second, in addition to those conditions, all three defendants are subject to SORNA's independent registration requirement for a period of at least twenty-five years, if not for the duration of their life, because of their status as Tier III sex offenders. *42 U.S.C. § 16913(a)(3), (b)(2)-(3).* This federal requirement that the defendants register as sex offenders is independent from any requirement under state law. Because this federal requirement remains in effect, whether defendants are properly subject to SORNA's registration requirement remains a live controversy for us to adjudicate, and these consolidated appeals thus are not moot.

In *Juvenile Male II*, the Supreme Court considered and rejected the argument that the appeal in that case "cannot be considered moot in any practical [**17] sense because . . . respondent may have an independent duty to register as a sex offender under SORNA itself." *131 S. Ct. at 2864-65.* The Supreme Court held that because the defendant had only challenged the validity of the special conditions of supervision, any broader question related to SORNA's requirement was not at issue. *Id. at 2865.* The Court did acknowledge that the independent, continuing obligation under SORNA, in another case, "might provide grounds for a

pre-enforcement challenge to SORNA's registration requirements." *Id.* The instant consolidated appeal is precisely such a case, as each defendant objects both specifically to the special condition requiring registration and generally to the constitutionality of SORNA as applied to juveniles, and therefore is not moot.

III. Conflict Between FJDA and SORNA

We next consider whether the SORNA registration requirement imposed by the district court contravenes the confidentiality provisions of the FJDA. [HN7] We review a district court's construction or interpretation of a statute de novo. *See Brennan v. TDI Managed Care Servs., 449 F.3d 1035, 1038 (9th Cir. 2006); United States v. Cabaccang, 332 F.3d 622, 624-25 (9th Cir. 2003)* (en (**18) banc).

The government argues that SORNA and the FJDA do not conflict because they each operate on different classes of individuals and agencies. Specifically, it contends that the FJDA's confidentiality provision restrict disclosure of the records of juvenile proceedings by employees of the court or any government agency. *18 U.S.C. § 5038(a)*, while SORNA's reporting requirements operate directly on the juvenile himself. We disagree with that characterization, and find that several provisions of the two statutes conflict because SORNA's registration provision makes public information that would otherwise remain confidential under the FJDA.

[HN8] The FJDA provides that "[u]nless a juvenile who is taken into custody is prosecuted as an adult neither the *name* nor *picture* of any juvenile shall be made public in connection with a juvenile delinquency proceeding." *18 U.S.C. § 5038(a)* (emphasis added). The FJDA further provides that "information about the juvenile record may not be released when the request for information is related to an [*1008] application for employment, license, bonding, or any civil right or privilege." *18 U.S.C. § 5038(a)*. SORNA, however, requires that a sex offender registry include [**19] the *name*, address, physical description, criminal history and status of parole, probation, or supervised release, *current photograph*, and other identifying information. *42 U.S.C. § 16914*. SORNA further requires that "each jurisdiction shall make available on the internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry." *42 U.S.C. § 16918(a)*. Because it is clear that the government's public release of juvenile records authorized by SORNA would have been prohibited under the FJDA prior to the passage of SORNA, we find that the two statutes conflict.

[HN9] Where two statutes conflict, the later-enacted, more specific provision generally governs. *See Acosta v. Gonzales, 439 F.3d 550, 553 (9th Cir. 2006)* ("[C]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute." (internal quotation marks omitted)), *abrogated on other grounds by Garfias-Rodriguez v. Holder, 649 F.3d 942, 948 (9th Cir. 2011)*.[HN10] SORNA unambiguously directs juveniles over the age of 14 convicted of certain aggravated sex crimes to register, [**20] and thus carves out a narrow category of juvenile delinquents who must disclose their juvenile crimes by registering as a sex offender. For all other juvenile delinquents, the FJDA's confidentiality provisions remain in force.

The relationship between SORNA and the FJDA is further clarified by Congress's clearly stated intent to limit confidentiality in the case of certain juvenile sex offenders. *See* H.R. Rep. 109-218, pt. 1, at 25 (2005) ("While the Committee recognizes that States typically protect the identity of a juvenile who commits criminal acts, in the case of sexual offenses, the balance needs to change; no longer should the rights of the juvenile offender outweigh the rights of the community and victims to be free from additional sexual crimes . . . . H.R. 3132 strikes the balance in favor of protecting victims, rather than protecting the identity of juvenile sex offenders."); 152 Cong. Rec. S8012, S8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy) ("This compromise allows some offenders over 14 to be included on registries, but only if they have been convicted of very serious offenses."). Thus, Congress was aware that it was limiting protections under the FJDA by [**21] applying SORNA to certain juvenile delinquents, and intended to do so.

We therefore hold that the district court properly applied SORNA's registration requirements to the juvenile defendants in these cases. Although the defendants may disagree with the policy implications of SORNA, particularly with regard to confidentiality, Congress appears to have considered those concerns in enacting SORNA. Our review is limited to interpreting the statutes, and both the statutory text and legislative history of SORNA suggest its reporting and registration

requirements were intended to reach a limited class of juveniles adjudicated delinquent in cases of aggravated sexual abuse, including appellants.

IV. Constitutional Challenges

Defendants further argue that subjecting juvenile sex offenders to SORNA's registration is unconstitutional. In particular, they allege that doing so violates (i) the *equal protection clause*; (ii) the prohibition against cruel and unusual punishment; (iii) the right against self-incrimination; (iv) substantive due process; (v) procedural due process; and (vi) the right [*1009] to effective counsel. [HN11] We review the constitutionality of a statute de novo. *Enriquez v. Powell, 302 F.3d 971, 973 (9th Cir. 2002)* [**22] (citing *Gray v. First Winthrop Corp., 989 F.2d 1564, 1567 (9th Cir. 1993)*).

A. Equal Protection

Defendants argue that SORNA's registration requirements violate the juveniles' right to equal protection by irrationally distinguishing between juvenile sex offenders over fourteen, who are categorically required to register as sex offenders, and other juvenile offenders, who are entitled to an adversary hearing on whether transfer to adult court is appropriate.

[HN12] The *Equal Protection Clause of the Fourteenth Amendment* applies strict scrutiny if the aggrieved party is a member of a protected or suspect class, or otherwise suffers the unequal burdening of a fundamental right. *City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-40, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*. "Government actions that do not . . . involve suspect classifications will be upheld if [they] are rationally related to a legitimate state interest." *Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1208 (9th Cir. 2005)*.

However, defendants — juvenile sex offenders over the age of fourteen — do not fall within a protected class. We have previously rejected the argument that sex offenders are a suspect or protected class. *United States v. LaCroix, 260 F.3d 1012, 1030-31 (9th Cir. 2001)*. [**23] Further, [HN13] "age is not a suspect classification under the *Equal Protection Clause*." *Gregory v. Ashcroft, 501 U.S. 452, 470, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)* (citing *City of Cleburne, 473 U.S. at 441* ("We have declined, however, to extend heightened review to differential treatment based on age")).

This conclusion is consistent with that of the Sixth Circuit, which heard an equal protection challenge to a similar juvenile registration requirement in *Doe v. Michigan Department of State Police, 490 F.3d 491 (6th Cir. 2007)*. There, the defendants challenged a Michigan sex offender registration program, in part, because it "requir[ed] youthful trainees charged with sex offenses to register while not requiring youthful trainees charged with other offenses to do so." *Id. at 502*. The Sixth Circuit, noting that the set of suspect classifications recognized by the Supreme Court was limited, held that "the classification raised by the plaintiffs does not implicate a suspect class and that rational-basis review is accordingly appropriate." *Id. at 503*.

Because defendants in this case have failed to establish membership in a recognized protected class, SORNA is subject to rational basis review for the purpose of equal protection [**24] analysis. SORNA's language and legislative history clearly indicate the legislative purpose for which it was enacted. *See 42 U.S.C. § 16901* (in enacting SORNA, "Congress . . . establishes a comprehensive national system" that is designed to "protect the public from sex offenders and offenders against children"); *Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007)* (noting that SORNA was "designed . . . for the protection of the public"). We have held that protecting our communities is a legitimate legislative purpose. *See Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004)* (holding, with regard to Alaska's sex offender registration laws, that "the statute's provisions serve a 'legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community'") (internal quotation marks omitted). The Supreme Court has also held that "there is no doubt [*1010] that preventing danger to the community is a legitimate regulatory goal." *United States v. Salerno, 481 U.S. 739, 747, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*. Thus, SORNA's requirements satisfy rational basis review and do not violate the *Equal Protection Clause*.

B. [**25] Cruel and Unusual Punishment

Defendants argue that by sanctioning a class of juvenile offenders with registration requirements, SORNA violates the *Eighth Amendment's* prohibition on cruel and unusual punishment.

[HN16] The *Eighth Amendment* mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The amendment prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm, 463 U.S. 277, 284, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)* (holding that defendant's *Eighth Amendment* right was violated where defendant received the "penultimate sentence" for a minor, check writing offense).

The bar for cruel and unusual punishment is high. *See, e.g., United States v. Nagel, 559 F.3d 756, 763 (7th Cir. 2009)* (citing *Ewing v. California, 538 U.S. 11, 28-30, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003)* (affirming sentence of 25 years to life imposed for felony grand theft of three golf clubs under three strikes law); *Harmelin v. Michigan, 501 U.S. 957, 961, 966, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)* (affirming life in prison without the possibility of parole for first-time offender possessing 672 grams of cocaine); *Hutto v. Davis, 454 U.S. 370, 370-71, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982)* (no constitutional [**26] error in two consecutive terms of 20 years in prison for possession with intent to distribute and distribution of 9 ounces of marijuana)).

Although defendants understandably note that SORNA may have the effect of exposing juvenile defendants and their families to potential shame and humiliation for acts committed while still an adolescent, the statute does not meet the high standard of cruel and unusual punishment. The requirement that juveniles register in a sex offender database for at least 25 years because they committed the equivalent of aggravated sexual abuse is not a disproportionate punishment. These juveniles do not face any risk of incarceration or threat of physical harm. In fact, at least two other circuits have held that SORNA's registration requirement is not even a punitive measure, let alone cruel and unusual punishment. *See United States v. May, 535 F.3d 912, 920 (8th Cir. 2008)* ("SORNA's registration requirement demonstrates no congressional intent to punish sex offenders"); *see also United States v. Young, 585 F.3d 199, 204-05 (5th Cir. 2009)*.

Given the high standard that is required to establish cruel and unusual punishment, we hold that SORNA's registration requirements [**27] do not violate the *Eighth Amendment*.

C. Self-Incrimination

Defendants argue that SORNA's registration requirement violates the *self-incrimination clause of the Fifth Amendment* by requiring registrants to file documents acknowledging commission of a sex offense. Because SORNA registrants are compelled to register under threat of legal sanction, and because the documents could potentially be used to prove the commission of a prior sex crime or in determining sentencing enhancements, defendants argue that the registration requirement is unconstitutional.

[*1011] [HN15] The *Fifth Amendment* protects a person from being "compelled in any criminal case to be a witness against himself." *U.S. Const. amend. V*. This protection extends not only to criminal proceedings, but may proceeding in which the answers might incriminate the individual in a *future* criminal proceeding. *Allen v. Illinois, 478 U.S. 364, 368, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986)* (emphasis added). "[T]he *Fifth Amendment* privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Balt. Dept of Social Servs. v. Bouknight, 493 U.S. 549, 556, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990)*.

[HN16] The registration [**28] required under SORNA does not subject the defendants to any additional criminal exposure or liability. Rather, it requires only an acknowledgment that they have been previously adjudicated or convicted of a crime. The *Fifth Amendment* is designed to protect against prospective incrimination, but here the defendants have already pleaded true to the underlying criminal conduct. Other circuits have also rejected *Fifth Amendment* challenges to sex offender registration. *See, e.g., United States v. Simon-Marcos, 363 Fed. App'x 726, 728 (11th Cir. 2010)* ("[Defendant] cannot show, and does not attempt to show, that anything he would have been required to provide under Georgia's sex offender statute would have confronted him with a substantial hazard of self-incrimination."); *Doe v. Miller, 405 F.3d 700, 717-18 (8th Cir. 2005)* (holding that *Fifth Amendment* challenge to sex offender registration statute "is both misdirected and premature").

Review of the cases in which the Supreme Court concluded that registration requirements violate the *self-incrimination clause* is instructive. In these cases, it is evident that an unconstitutional registration would require disclosure that is effectively an [**29] admission

of unchanged criminal activity. *See, e.g., Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969)* (invalidating statute requiring defendant to identify himself as transferee of marijuana who had failed to register and pay an occupational tax); *Haynes v. United States, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923, 1968-1 C.B. 613 (1968)* (striking down statute that required registration of individuals transacting in firearms and that was applied only to weapons used principally by persons engaged in unlawful activities); and *Marchetti v. United States, 390 U.S. 39, 60-61, 88 S. Ct. 697, 19 L. Ed. 2d 889, 1968-1 C.B. 300 (1968)* (striking down statute requiring gamblers to register with the Internal Revenue Service, in light of wide prohibition of gambling). Under these statutes, compliance with the disclosure requirements "produced an immediate or real and appreciable hazard of self-incrimination due to the fact that the statutes were largely designed to discover . . . involvement in the prohibited activity." *S.E.C. v. Pabs, 97 F.3d 1276, 1292 (9th Cir. 1996)* (internal quotation marks omitted). That is not the case with SORNA, which does not require the disclosure of any information that would constitute admission of an uncharged crime.

Because defendants fail to establish that registration [**30] under SORNA could subject them to future criminal liability, they cannot properly avail themselves of the *Fifth Amendment's* protections against self-incrimination.

D. Substantive Due Process

Defendants argue that SORNA's registration requirement violates their substantive due process rights because it discards their "right to lifetime confidentiality" under the FIDA and subjects them to "onerous lifetime probation."

[*1012] [HN17] The *Due Process Clause* protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*. In a substantive due process analysis, we must first consider whether the statute in question abridges a fundamental right. *Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)* (explaining that the analysis begins with a "careful description of the asserted right"). If it does, the statute will be subject to strict scrutiny and is invalidated unless it is "narrowly tailored to serve a compelling state interest." *Id.* If not, the statute need only bear a "reasonable relation to a legitimate state interest to justify the action." *Washington v. Glucksberg, 521 U.S. 702, 722, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)*.

Defendants [**31] fail to identify the fundamental right implicated by SORNA's registration requirement, and instead focus on whether the statute is penal in nature under the factors laid out in *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)*. The Supreme Court has described [HN18] the "fundamental" rights protected by substantive due process as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the *Fourteenth Amendment*." *Glucksberg, 521 U.S. at 727*. Those rights are few, and include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment. *Id. at 720*. None of these rights are, or could be, asserted by defendants in this case. Nor do any of defendants' rights that are potentially at stake appear to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by* [**32] *Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)*, and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937)*.

This conclusion is consistent with our holding in *Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004)*, where we found that individuals convicted of serious sex offenses do not have a fundamental right to be free from sex offender registration requirements, and that such requirements serve "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* (internal quotation marks omitted). Several other circuits have similarly rejected substantive due process challenges to sex offender registration, holding that sex offenders do not have a fundamental right to avoid publicity. *See, e.g., United States v. Ambert, 561 F.3d 1202, 1209 (11th Cir. 2009)* (holding that the right of a sex offender to refuse subsequent registration of his or her personal information

with Florida law enforcement and prevent publication of this information on Florida's Sexual Offender/Predator website is not a right that is [**33] "deeply rooted in this Nation's history and tradition"); *Doe v. Moore, 307 F.3d 961, 965-66 (9th Cir. 2007)* (holding that juvenile sex offenders' interest in private records was not a fundamental right); *Doe v. Mich. Dep't of State Police, 490 F.3d 491, 501 (6th Cir. 2007)* (holding that juvenile sex offender registration "does not rise to the level of a substantive due process violation based upon the relevant [*1013] caselaw, but the inconsistency and the harms to the plaintiffs from their inclusion on the registry are troubling and noteworthy").

Given the limited range of rights that have been recognized as "fundamental" for the purposes of substantive due process analysis, defendants have failed to establish a substantive due process violation.

E. Procedural Due Process

Defendants argue that SORNA's registration requirement violates their procedural due process rights by treating their juvenile adjudication as a criminal conviction, and subjecting them to the resulting publicity, without the benefit of a public jury trial or transfer hearing.

[HN19] We analyze a procedural due process claim in two steps. "[T]he first asks whether there exists a liberty or property interest which has been interfered [**34] with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Carver v. Lehman, 558 F.3d 869, 872 (9th Cir. 2009)* (quoting *Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)*).

Defendants argue that the interest at stake is their expectation of confidentiality in juvenile proceedings, which they allege is undermined by SORNA's public registration requirements. However, SORNA does not render the entire juvenile adjudication process public. Juvenile sex offenders can still avail themselves of closed hearings, sealed records, and the other procedural protections of the juvenile process. But more importantly, because we conclude that the confidentiality provisions of the FJDA were intentionally superseded by the passage of SORNA, the underlying interest in confidentiality that defendants rely upon no longer exists. In the absence of that specified statutory right, defendants offer no support for the notion that they have a broader right. In fact, the Supreme Court has held that [HN20] adverse publicity or harm to the reputation of sex offenders does not implicate a liberty interest for the purposes of due process analysis. [**35] *Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003)*.

Defendants rely heavily on the factors set forth in *Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)*, to establish that SORNA is a punitive statute, and thus necessarily deprives them of a liberty or property interest. Whether SORNA is punitive is not dispositive. Even if defendants were correct that SORNA is punitive, that does not necessarily give rise to a protected liberty interest for the purposes of due process. We have recognized that [HN21] constitutionally protected liberty interests can be created where a law sets forth "substantive predicates to govern official decision making" and contains "explicitly mandatory language" that mandates a particular outcome. *Valdez v. Rosenbaum, 302 F.3d 1039, 1044 (9th Cir. 2002)* (internal quotation marks omitted). However, no such legal basis exists here, as the FJDA's provisions have been superseded by SORNA. Our conclusion is consistent with that of other circuits that have considered this question, each rejecting the argument that SORNA is a punitive statute and characterizing it instead as a civil regulation.[4] *See, e.g., United States v. May, 535 F.3d 912, 920 (8th Cir. 2008)* ("SORNA's registration [**36] requirement [*1014] demonstrates no congressional intent to punish sex offenders"); *see also United States v. Young, 585 F.3d 199, 204-05 (5th Cir. 2009)* ("[W]e now hold -- in line with all of our sister Circuits to have considered the issue -- that SORNA is a civil regulation").

> 4 Because we need not reach this question to determine whether SORNA's registration provision violates Defendants' procedural due process rights or constitutes cruel and unusual punishment, we do not specifically adopt this holding for the Ninth Circuit.

Even if defendants had sufficiently identified an interest at stake, juvenile offenders would not be entitled to any additional process before they are subject to SORNA's registration requirements. [HN22] Additional process is only necessary where it gives a sex offender the ability to prove or disprove facts related to the applicability of the registration requirement. In other words, where "the law's requirements turn on an offender's conviction alone -- a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest" -- no additional process is required for due process. *Doe v. Tandeske, 361 F.3d 594, 596 (9th Cir. 2004)* (internal quotation [**37] marks omitted) (rejecting procedural due process challenge to state sex offender registration statute where additional process would be a "bootless exercise" because the only relevant fact to whether registration is required is whether a conviction exists); *see also Conn. Dep't of Pub. Safety, 538 U.S. at 7-8* (denying procedural due process challenge to state sex offender registry where registration was required by the fact of conviction as sex offender, irrespective of any other factors, thus rendering any additional process meaningless and nonnecessary). In this case, juvenile sex offenders are required to register on the basis of their adjudicated juvenile status, which explicitly triggers SORNA's requirements under *42 U.S.C. § 16913*. Thus, because defendants are not challenging whether they received adequate due process in their juvenile proceedings, there is no basis for a procedural due process claim.

Further, adequate procedural safeguards at the conviction stage are sufficient to obviate the need for any additional process at the registration stage. *United States v. Parnumeh, 636 F.3d 1254, 1257 (9th Cir. 2011)* ("Defendant was afforded due process in his criminal proceeding [**38] and chose to plead guilty to a sex offense. Requiring Defendant to register as a sex offender does not violate his right to procedural due process."). The purpose of due process is to protect juvenile sex offenders from unjust registry, but any juvenile required to register under SORNA was protected at their adjudication by the "fundamental fairness" standard. *McKeiver v. Pennsylvania, 403 U.S. 528, 543, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1970)*.

Defendants may have serious concerns about the policy ramifications of SORNA, particularly with regard to confidentiality. However, even if SORNA subjects juvenile sex offenders to a condition that adult sex offenders must comply with, that does not necessarily eradicate all differences between the adult and juvenile processes and transform the latter into a "criminal" proceeding. Defendants' concerns about SORNA do not rise to a level that merits constitutional recourse on procedural due process grounds.

F. Ineffective Assistance of Counsel

At the second oral argument in this case, defendants' counsel briefly raised, for the first time, an additional constitutional argument grounded in the *Sixth Amendment's* guarantee of effective assistance of counsel. Defendants' counsel failed [**39] to further explain the basis for this argument in any detail at oral argument, but did acknowledge it was not raised in any of the briefing.

Because this argument was not presented in the briefs -- including those specifically [*1015] invited by us on any constitutional issues implicated by SORNA -- it has been forfeited. *Butler v. Curry, 528 F.3d 624, 642 (9th Cir. 2008)* (holding that [HN23] a party has waived an argument where it "fail[ed] to raise it either in the district court or in his brief on appeal, [and] mention[ed] it for the first time at oral argument"). [HN24] "We review only issues [that] are argued specifically and distinctly in a party's opening brief." *Christian Legal Soc'y of Univ. of Cal. v. Wu, 626 F.3d 483, 485 (9th Cir. 2010)* (quoting *Brownfield v. City of Yakima, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010)*). Applying this standard, we have refused to address claims that were only "argue[d] in passing," *Brownfield, 612 F.3d at 1149 n.4*, or that were "bare assertion[s] . . . with no supporting argument," *Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1079 n.26 (9th Cir. 2008)*. We therefore decline to address Defendants' ineffective assistance of counsel argument.

V. Conclusion

We therefore [**40] affirm the district courts' imposition of SORNA's registration requirements as a condition of probation or supervision on the three juvenile defendants in this case.

AFFIRMED.

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PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND, Plaintiff-Appellee, v. UNITED STATES DEPARTMENT OF THE AIR FORCE, Defendant-Appellant. SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; REBOUND, Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Defendant-Appellee. SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; REBOUND, Plaintiffs-Appellees, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Defendant-Appellant.

No. 90-16659, No. 91-35076, No. 91-35193

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

26 F.3d 1479; 1994 U.S. App. LEXIS 15012; 128 Lab. Cas. (CCH) P33,106; 94 Cal. Daily Op. Service 4595; 94 Daily Journal DAR 8535

January 7, 1992, Argued, Submitted; March 15, 1993, Submission Withdrawn; April 14, 1994, Resubmitted, Seattle, Washington
June 20, 1994, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-89-00713-ACK. Also C. Kay, District Judge, Presiding. Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-89-1346-C. John C. Coughenour, District Judge, Presiding.

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Personal Information
[HN1] See *5 U.S.C.S. § 552(b)(7)(C)*.

Administrative Law > Governmental Information > Freedom of Information > Enforcement > Standards of Review

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN2] The Ninth Circuit ordinarily reviews a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the correct substantive law. In the Ninth Circuit, however, a two-step standard of review is applied to Freedom of Information Act cases. The court determines whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > General

Overview
[HN3] *5 U.S.C.S. § 552(b)(6)* requires that courts balance the public interests in disclosure against the privacy interests that would be harmed by disclosure. A court cannot limit its evaluation of the effects of disclosure to the requesting party's particular purpose in seeking disclosure.

Administrative Law > Governmental Information > Personal Information > General Overview
Constitutional Law > Substantive Due Process > Privacy > Personal Information
[HN4] Significant privacy interests are implicated by the release of names, addresses and particularized wage information.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files
[HN5] The privacy interest protected by *5 U.S.C.S. § 552(b)(6)* encompasses the individual's control of information concerning his or her person. An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.

Administrative Law > Governmental Information > Personal Information > General Overview
[HN6] Workers on federally-funded construction projects have a substantial privacy interest in information tying their names and addresses to precise payroll figures.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN7] The Freedom of Information Act only recognizes the public's interest in knowing "what their government is up to" and does not create an avenue to acquire information about other private parties held in the government's files.

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John F. Daly, United States Department of Justice, Washington, D.C., for the defendant-appellee, appellant, in 91-35076 91-35193.

JUDGES: Before: Eugene A. Wright, William A. Norris, and Cynthia Holcomb Hall, Circuit Judges. Opinion by Judge Hall; Concurrence by Judge Norris.

OPINION BY: HALL

OPINION

[*1481] OPINION

HALL, Circuit Judge:

We have before us two cases in which labor organizations seek to procure records from government agencies under the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*. They seek to glean insight into the government's enforcement of prevailing [**2] wage standards for employees of government contractors. In each case, the district court ruled for the labor organization and ordered the government agency to produce the information. We reverse.

I

In No. 90-16659, the Painting Industry of Hawaii Market Recovery Fund ("Recovery Fund") sought disclosure from the Air Force of certain payroll information provided to the government by a private contractor working on a construction contract at Hickam Air Force Base. The contractor was required to pay workers the prevailing wage for their work under the Davis-Bacon Act, *40 U.S.C. § 276a*, and Federal Acquisition Regulations, *48 C.F.R. §§ 22.402-22.407*. Under the Copeland Anti-Kickback Act, *40 U.S.C. § 276c*, the contractor was required to file "certified payroll records" with the contracting agency (here, the Air Force). These records contain detailed information about each employee working on a particular project: the worker's name and address, social security number, job classification, hourly rate of pay, number of hours worked during the reporting period, wages and fringe benefits paid, and deductions taken out [**3] of the worker's wages.

The Air Force denied Recovery Fund's FOIA request for the certified payroll records for the Hickam Air Force Base Project, asserting that the information fell within FOIA's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *5 U.S.C. § 552(b)(4)* ("Exemption 4"). Recovery Fund filed an administrative appeal, which was also denied. Recovery Fund then brought suit in district court to compel disclosure of the payroll records. The Air Force asserted a defense not only under Exemption 4, but also under Exemption 6 [1] and Exemption 7(C) to FOIA. [2] On cross-motions for summary judgment, the district court held that genuine issues of material fact precluded summary judgment on the Air Force's Exemption 4 defense. *751 F. Supp. 1410, 1414-15*. The district court granted partial summary judgment to Recovery Fund, holding that Exemption 6 did not justify nondisclosure of most of the information contained in the payroll records because "the employees' modest privacy interest in preventing disclosure of such information when balanced against [**4] the significant public interests in monitoring compliance with the Davis-Bacon Act tips decidedly in favor of disclosure." *Id. at 1417*. The district court held that the employees' social security numbers were properly withheld under Exemption 6. *Id. at 1418*.

1 FOIA Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(6)*.

2 "[HN1] This section does not apply to matters that are records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C)*.

Finally, the district court granted partial summary judgment for Recovery Fund on the Air Force's Exemption 7(C) defense. The [**5] district court did not reach the question of whether the payroll records were "compiled for law enforcement purposes" because it held that the Air Force did not show that the "balance of private versus public interests under the analysis of Exemption 6 was so close" that the slightly lighter burden of proof imposed on the Air Force by Exemption 7(C) "would tilt that balance in favor of non-disclosure." *Id. at 1418*. [3]

3 "Exemption 7(C) is more protective of privacy than Exemption 6: the former provision applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,' while the latter bars any disclosure that 'would constitute' an invasion of privacy that is 'clearly unwarranted.'" *United States Dep't of Defense v. FLRA, 127 L. Ed. 2d 325, 114 S. Ct. 1006, 1013 n.6 (1994)*.

[*1482] After the district court denied the Air Force's motion for reconsideration, *756 F. Supp. 452*, [**6] the Air Force withdrew its defense based on Exemption 4 and stipulated to the entry of final judgment in the district court. The Air Force offered to provide the payroll records to Recovery Fund with the names, addresses, and other personal identifiers of the workers redacted. The Air Force appeals the district court's grant of summary judgment in favor of Recovery Fund as to Exemptions 6 and 7(C).

In No. 91-35076, Seattle Building and Construction Trades Council, AFL-CIO, and Rebound (collectively "Rebound") requested that the Department of Housing and Urban Development ("HUD") release copies of certified payroll records. These records were filed in connection with a housing rehabilitation project carried out by the City of Seattle with assistance from HUD. The records were submitted by the City's electrical contractor. The City released the records after redacting all information that would identify individual workers, such as their names, addresses, and social security numbers. HUD informed Rebound that the identifying information had been properly redacted pursuant to Exemptions 6 and 7(C). The redaction was affirmed on administrative appeal.

Rebound filed suit in district court [**7] to compel disclosure of the certified payroll records with only social security numbers redacted. Rebound also sought a variety of other remedies, including an injunction ordering future release of similar records, declaratory relief, attorneys' fees, and the appointment of a special prosecutor pursuant to *5 U.S.C. § 552(a)(4)(F)*. On cross-motions for summary judgment, the district court granted partial summary judgment for Rebound and rejected HUD's Exemption 6 and 7(C) defenses. The district court followed a similar line of analysis as the district court in *Recovery Fund*. The district court ordered HUD to

produce the records sought by Rebound, with social security numbers redacted, and denied the other relief sought by Rebound. Both parties appeal.

II

[HN2] We ordinarily review a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the correct substantive law. *Zung v. State Farm Fire & Casualty Co., 873 F.2d 1338, 1339-41 (9th Cir. 1989)*. In this circuit, however, [**8] we apply a two-step standard of review to FOIA cases. We determine whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt. *Lewis v. IRS, 823 F.2d 375, 377-78 (9th Cir. 1987); but see Petroleum Information Corp. v. United States Dep't of Interior, 298 U.S. App. D.C. 123, 976 F.2d 1429, 1433 (D.C. Cir. 1992)* (D.B. Ginsburg, J.) (applying "in FOIA cases the same standard of appellate review applicable generally to summary judgments").

III

[HN3] We now turn to the merits. Exemption 6 requires that courts balance the public interests in disclosure against the privacy interests that would be harmed by disclosure. *United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989)*. We cannot limit our evaluation of the effects of disclosure to the requesting party's particular purpose in seeking disclosure. *Id. at 771* [**9] ("Whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made."). We must evaluate both the public benefit and the potential invasion of privacy by looking at the nature of the information requested and the uses to which it *could* be put if released to *any* member of the public. *See United States Dep't of Defense v. FLRA, 127 L. Ed. 2d 325, 114 S. Ct. 1006, 1015-16 (1994)* ("when we consider that other parties, such as commercial advertisers and solicitors, must have the same access [**1483] under FOIA as the unions to the employee address lists sought in this case, it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant.") (citations omitted); *Reporters Committee, 489 U.S. at 771* ("The rights of the two press [requesters seeking to procure criminal rap sheets] are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer."); *see also Department of the Air Force v. Rose, 425 U.S. 352, 380-81, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976)* [**10] (when evaluating a request filed by law review editors for disclosure of Air Force Academy discipline reports from which names were redacted, court considered possibility that former classmates might be able to identify subjects of the reports even though the requesters would not be able to do so); *National Ass'n of Retired Fed. Employees v. Horner, 279 U.S. App. D.C. 27, 879 F.2d 873, 878 (D.C. Cir. 1989)* (considering use to which mass marketers would put list of federal retirees in evaluating employee association's request for name and address list), *cert. denied, 494 U.S. 1078, 110 S. Ct. 1805, 108 L. Ed. 2d 936 (1990)*.

A

We first consider the privacy interests implicated by the FOIA requests at issue. The requesters seek to procure not only a name and address list of workers, but a list that connects those names to precise information about each worker's occupational classification, wages, and wage deductions. It cannot be disputed that this information is normally considered private. In *Horner*, the District of Columbia Circuit held that a list revealing only the names [**11] and addresses of federal retirees constituted a "significant" invasion of privacy because the retirees would be attractive targets for mass marketers. *Horner, 879 F.2d at 878*; *see also United States Dep't of Defense, 114 S. Ct. at 1015* (interest in nondisclosure of home addresses is "not insubstantial"); *FLRA v. United States Dep't of Veterans Affairs, 958 F.2d 503, 510-11 (2d Cir. 1992)*.

In the cases before us, the requesters seek a list of people engaged in the construction trade, broken into their particular occupational classification. Undoubtedly, such a list would be of interest to people interested in marketing goods and services to people working in the construction trades. As in *Horner*, there is a "substantial probability that the disclosure will lead to" the use of the list by marketers and a concomitant invasion of the workers' right to be let alone. *See Horner, 879 F.2d at 878*; *see also United States Dep't of Defense, 114 S. Ct. at 1015-16* (privacy interest [**12] for from insignificant when considering commercial advertisers must have the same access under FOIA). In *Minnis*, we recognized the

invasion of privacy that can result from release of a list of names and addresses coupled with a characteristic susceptible to commercial exploitation: "Disclosure [of a list of persons seeking a permit to use a particular river for recreational purposes] would reveal not only the applicants' names and addresses, but also their personal interests, in water sports and the out-of-doors. Other commercial advertisers could obtain the list, subjecting the applicants to an unwanted barrage of mailings and personal solicitations." *Minnis*, 737 F.2d at 787 (citation omitted).

[HN4] The requesters here not only seek names and addresses, but also particularized information about wages. We agree with those circuits that have considered the issue that significant privacy interests are implicated by the release of this information. *See Painting & Drywall Work Preservation Fund v. HUD, 290 U.S. App. D.C. 243, 936 F.2d 1300, 1303 (D.C. Cir. 1991)* ("Disclosure of the requested data would constitute [**13] a substantial invasion of privacy."); *Hopkins v. HUD, 929 F.2d 81, 87 (2d Cir. 1991)* ("We have no doubt that individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses, particularly where, as here, the names and addresses would be coupled with personal financial information.") (citations omitted).

The requesters argue that the workers' reasonable expectations that wage information will be kept confidential is weakened in this particular context because other federal [*1484] and state laws compel disclosure of major aspects of the requested information. [HN5] However, "the privacy interest protected by Exemption 6 'encompasses the individual's control of information concerning his or her person.' An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *United States Dep't of Defense, 114 S. Ct. at 1015* (citation omitted) (emphasis added). [4]

4 Requesters describe the Court's decision in *United States Dep't of Defense*, as predicated on the workers' decisions not to disclose their home addresses to their collective bargaining representative. *114 S. Ct. at 1015*. The Court uses the workers' decision to demonstrate their "nontrivial privacy interest in nondisclosure" even if the information was available to the public in some other form. *Id.* Under the facts of this case, we do not send such evidence to bolster our conclusion that workers have a significant privacy interest in the requested information regarding their wages.

[**14] Moreover, the requesters' argument ignores the facts. The Davis-Bacon Act requires wage scales on federally-funded construction projects to be posted in a "prominent and easily accessible place at the site of work." *40 U.S.C. § 276a(a)*. The requesters, however, are not seeking disclosure of wage scales, but actual payroll information for individual workers. Since neither the hours worked by a particular individual, that individual's job classification, nor even the fact that an individual is working on a project is rendered public information by the Davis-Bacon Act, the requesters overestimate the intrusion into the workers' financial privacy worked by the posting requirement.

Recovery Fund also argues that the workers on the Hickam Air Force Base project have a diminished expectation of privacy because Hawaii's freedom of information statute makes certified payroll records for public works projects available for public inspection. *Hawaii Rev. Stat. § 92F-12(a)(9)*. Because construction workers usually work on a number of projects during any one year, Recovery Fund argues, some of their income information is already publicly available if they have [**15] worked on any state public works projects. Thus, the additional invasion of privacy that results from disclosing payroll information on federal construction contracts is minimal. The answer to this is quite simple: the payroll records that the labor organizations here seek remain private because they contain information entirely distinct from Hawaii state contract payroll records.

[HN6] In sum, we conclude that workers on federally-funded construction projects have a substantial privacy interest in information tying their names and addresses to precise payroll figures.

B

Having concluded that substantial privacy interests would be implicated by fulfillment of the FOIA requests at issue, we now consider whether FOIA recognizes a public interest in disclosure that might outweigh the intrusion that such disclosure would bring about. [HN7] FOIA only recognizes the public's interest in knowing "what their government is up to" and does not create an

avenue to acquire information about other private parties held in the government's files. *Reporters Committee, 489 U.S. at 772-73*. [5] The requesters here both acknowledge that, in light of *Reporters* [**16] *Committee*, they cannot request disclosure of the records on the basis that they would be useful in searching for violations of the Davis-Bacon Act by federal contractors. They accordingly frame the public benefit to be served by disclosure as an inquiry into the government's diligence in enforcing Davis-Bacon. [*1485] They argue that this would fulfill the "basic purpose" of FOIA: to "open agency action to the light of public scrutiny." *Rose, 425 U.S. at 372*.

5 *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 598 v. Dep't of the Army, Corps of Engineers, 841 F.2d 1459 (9th Cir. 1988)*, a case reviewing the district court's failure to award attorneys' fees to a labor organization after the district court awarded disclosure of certified payroll records, has been overruled by a pair of Supreme Court cases. *Local 598*'s analysis was predicated on the assumption that "the public interest in the enforcement of labor laws" constitutes a cognizable public interest under FOIA. *Local 598, 841 F.2d at 1462*. Since *Local 598*'s public interest analysis was not focused on whether the disclosed documents would reveal what the government is up to, its reasoning was implicitly overruled by *Reporters Committee* and explicitly rejected by *United States Dep't of Defense, 114 S. Ct. at 1014*.

[**17] The circuits disagree about the appropriateness of such "derivative use" arguments in analyses of the FOIA privacy exemptions. *Compare Department of Veterans Affairs*, 958 F.2d at 512 (rejecting derivative-use argument is always appropriate) *and Hopkins*, 929 F.2d at 88 ("Disclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official.") (emphasis in original) *with Painting and Drywall, 936 F.2d at 1303* (derivative use is a public interest cognizable under FOIA); *see also United States Dep't of Navy v. FLRA, 975 F.2d 348, 353 n.3 (7th Cir. 1992)* (agreeing with Second Circuit that "virtually any piece of information about a government employee could possibly provide some assistance to an investigative reporter").

The Supreme Court has avoided the issue. *See United States Dep't of Town v. Ray, 116 L. Ed. 2d 526, 112 S. Ct. 541, 549-50 (1991)*. If "derivative" public benefits are merely those [**18] which require some tabulation of data released under FOIA, or perhaps some further research on the part of the requester, we see no reason why the extra effort required of the requester should, in every case, render a proffered public benefit more or less strong. The problem in the cases before us, however, is that the additional step requires direct contact with the employees whose payroll records are being sought. Any additional public benefit the requesters might realize through those contacts is inextricably intertwined with the invasions of privacy that those contacts will work.

On balance, we hold that release of the information sought by the requesters would constitute a "clearly unwarranted invasion of personal privacy" and the payroll records are therefore exempt from disclosure under FOIA. The requesters here have less intrusive means of procuring the information they seek than having the government disgorge private information from its files. They may pass out fliers at the beginning or end of the workday to workers on federal contracts, providing a form for the employees to self-report the information the requesters now seek to procure through FOIA. They may post signs [**19] or advertisements soliciting information from workers about possible violations of the Davis-Bacon Act. Through any of these means, the requesters may procure the information they desire. Whether they seek to self-enforce the Davis-Bacon Act or to shed light on the government's enforcement of it, the government need not violate the privacy of these workers by disclosing unredacted payroll records.

We find the Sixth Circuit's discussion of privacy implications in an analogous situation instructive. In *Heights Community Congress v. Veterans Admin., 732 F.2d 526 (6th Cir.), cert. denied, 469 U.S. 1034, 83 L. Ed. 2d 398, 105 S. Ct. 506 (1984)*, that court held that a community group was not entitled to information about VA-insured loans from which the name and social security number of loan recipients would be redacted but property address and amount of loan would not be. [6] The court held that, on balance, Exemption 6 justified withholding of the information because its release would subject a veteran, who is not himself suspected of any wrongdoing, to involuntary personal involvement in [plaintiff's [**20] investigation of [racial] steering.

Even if [plaintiff] did not itself attempt to link addresses to specific veterans, any realtor or lender accused of steering by evidence compiled from individual VA loan reports could, if inclined to do so, certainly seek to examine the reports and counter the inference of steering by interrogating the individual buyers of the identified property. Holding a person's privacy hostage in this fashion is contrary . . . to the basic right in this nation simply to be left alone. Certainly nothing prevents [plaintiff] from publicly advertising its investigation and requesting any VA loan recipient who desires to cooperate with [plaintiff] to come. [*1486] forward if he so elects, or pursuing other less controversial avenues to obtain the information.

6 In an analysis cast into doubt by *Reporters Committee*, the court held that the purpose was proper under FOIA. *Heights Community Congress, 732 F.2d at 530.*

Id. at 530.

Finally, we [**21] note that the requesters already have a substantial amount of the information they seek. In each case, the government has agreed to provide the certified payroll records with names, addresses, and social security numbers redacted. Thus, the requesters can compare job classifications to pay rates to determine if employees are being paid the prevailing wage. We recognize that the redacted records would not permit the requesters to determine whether the government was discovering violations in which contractors misclassify workers in order to pay a less-than-prevailing wage or where contractors properly classify and compensate the worker on paper but require him or her to pay a kickback to the contractor. We simply believe that, as a matter of law, the employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering "what the government is up to." [7] Disclosure would therefore be a "clearly unwarranted invasion of personal privacy" and the government was justified in withholding the names and addresses pursuant to Exemption 6 of FOIA.

7 The requesters cite *Dobronski v. FCC, 17 F.3d 275 (9th Cir. 1994)*, as support for the importance of the information they seek. The interests weighed in that case, however, are dramatically different from those we weigh here today. In *Dobronski*, the requester had received a "tip" that a particular assistant bureau chief for the FCC had improperly used sick leave. *17 F.3d at 277.* The requester sought records that merely contained the dates on which the assistant bureau chief had taken sick leave. *Id. at 279.* Noting that the records did not disclose any information of a personal nature, such as the particular illness or condition necessitating the absence, the court in that instance found the balance weighed in favor of disclosure. *Id.* Like our decision in *Dobronski*, we believe a limited amount of information is appropriate for disclosure. For that reason, our decision is based in part on the government's willingness to provide information that will allow the requesters to compare job classifications to pay rates.

[**22] IV

Because we hold that Exemption 6 justifies the government's action in providing redacted copies of certified payroll records requested by the labor organizations, we need not reach the Exemption 7(C) issue nor Rebound's appeal concerning attorneys' fees and additional remedies. The judgments of the district courts below are REVERSED.

CONCUR BY: NORRIS

CONCUR

Norris, J., concurring:

I believe the critical question at issue is whether FOIA requires the government to release the payroll records with the individual employees' home addresses included. Plaintiffs want the addresses to enable them to contact the workers directly to check the accuracy of the records submitted to the government, and to determine whether the agencies are doing a satisfactory job in discovering reporting violations such as job misclassifications and secret kickback arrangements.

I come down on the side of nondisclosure because I believe that the release of home addresses would constitute a "clearly unwarranted" privacy invasion, outweighing even the public's substantial interest in release of these records. [1] The invasion of privacy that results from disclosure of one's home address is far more substantial than, say, [**23] the disclosure of one's

phone number. In contrast to phone numbers, home addresses are not routinely available. Many people choose to list their addresses in the phone book, but many do not. The reason is simple: publishing your phone number may invite annoying phone calls, but publishing your address can lead to far more intrusive breaches of privacy, [*1487] and even physical danger. [2]

1 I do not say, however, that the disclosure of home addresses would never be warranted. If the public interest is sufficiently strong, the balance may favor disclosure. But before a court authorizes the release of home addresses, it should first examine whether the proposed public benefit could be served just as well by disclosure of other identifying information. For instance, plaintiffs here may be able to accomplish their public monitoring purpose just as well (or very nearly so) by relying on the workers' telephone numbers, rather than their home addresses.

2 For the same reason, telephone directory assistance normally will not provide callers with addresses for the telephone numbers the callers have requested.

[**24] Although I agree with the result reached by the majority, I have two concerns with the majority's analysis. First, I am troubled by the manner in which the majority evaluates the privacy interests at stake in this case. While I do not dispute that the workers have a significant privacy interest in their home addresses, I question the way the majority assesses the consequences of disclosure in reaching its conclusion that disclosure would invade "substantial" privacy interests, and thereby produce a "clearly unwarranted invasion of personal privacy." Majority Opinion at 6474, 6476.

The majority's evaluation of the privacy invasion rests, in large part, on the generic statement by the government that disclosure would produce a "barrage of mailings" that would seriously intrude upon the privacy of the construction workers. *See* Majority Opinion at 6472-74. The majority buys into this assumption even though the government has failed to produce any evidence to suggest that these construction workers constitute a targeted group who would be exploited by mass marketers. In my view, the government may not rely on mere conjecture in describing the extent of the privacy invasion that would [**25] result. It must show that there is a "substantial probability" that the information would be used in the intrusive manner that is being suggested. *National Ass'n of Retired Fed. Employees v. Horner, 279 U.S. App. D.C. 27, 879 F.2d 873, 878 (D.C. Cir. 1989); see also United States Dep't of State v. Ray, 116 L. Ed. 2d 526, 112 S. Ct. 541, 548 n.12 (1991)* (citing *Horner* and rejecting a per se rule against disclosing lists of names and other identifying information). A vague assertion that someone *might* be interested in reaching persons identified on government records is not enough; there must be some sort of evidentiary showing to suggest the sorts of intrusive consequences that would likely flow from disclosure. *See Horner, 879 F.2d at 876, 878; Bloch v. United States Postal Serv., 256 U.S. App. D.C. 128, 803 F.2d 1206, 1209 (D.C. Cir. 1986)* ("The agency bears the burden of setting forth 'a relatively detailed justification' for assertion of an exemption . . . .").

My second concern regards the [**26] majority's valuation of the public interest at stake. The Supreme Court recently reaffirmed the fundamental principle that "disclosure, not secrecy, is the dominant objective of [FOIA]." *United States Dep't of Defense v. FLRA, 127 L. Ed. 2d 325, 114 S. Ct. 1006, 1012 (1994)* (quoting *Department of Air Force v. Rose, 425 U.S. 352, 361, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976)* (emphasis added)). In place of the strong presumption in favor of disclosure, the majority discounts the public interest by adopting a per se rule that such an interest is minimal if it depends on "derivative use" that requires any contact with individuals. While I agree with the majority that there should be no per se rule barring courts from considering the "derivative uses" of information as part of the public benefits to disclosure, [3] *see* Majority Opinion at 6476, I disagree with the majority's apparent suggestion courts should ignore the public benefits of disclosure if such benefits depend on a "derivative use" that involves direct contact with individuals. *Id.* at 6476. As the majority states: [**27]

3 In the past three years, the Supreme Court has twice declined to adopt such a per se rule, *see United States Dep't of Defense, 127 L. Ed. 2d 325, 114 S. Ct. 1006; Ray, 112 S. Ct. at 549*, and I see no justification for adopting it as the law of our circuit. It is often impossible to find out what one document means unless it is read in a larger context, supplemented with information that comes from other sources. *See Painting and Drywall Work Preservation Fund v. HUD, 290*

U.S. App. D.C. 243, 936 F.2d 1300, 1303 (D.C. Cir. 1991) ("We have recognized that a relevant public interest could exist where the names of current workers might provide leads for an investigative reporter seeking to ferret out what government is up to.") (quotation marks omitted). Conflicting the public interest inquiry to the four corners of the document requested would be unnecessarily formalistic and inconsistent with FOIA's general policy of full agency disclosure.

[**28] The problem in the cases before us . . . is that the additional step requires direct contact with the employees whose payroll records are being sought. Any additional public benefit the requesters might realize through those contacts is *inextricably intertwined* with the invasions of privacy that those contacts will work.

[*1488] *Id.* (emphasis added). The fact that the public benefits of disclosure may be "intertwined" with the privacy interests should in no way diminish the importance of the public interest asserted. The public interest inquiry and the privacy inquiry are two separate strands of the analysis: the strength of the public interest has no bearing on the strength of the privacy interest, nor does the privacy interest affect the weight of the public interest. To be sure, the two factors ultimately get balanced against one another, but they must be evaluated independently. To mix the two factors together *before* the balancing phase unnecessarily confuses the analysis.

In short, the majority's adoption of a per se rule against considering derivative uses in weighing the public interest conflicts with FOIA's "strong presumption in favor of disclosure." *Roy, 112 S. Ct. at 547*, [**29] By confining the public interest to the information contained in the four corners of agency records, the majority resets the FOIA scales heavily against disclosure. [4]

4 This is particularly troubling in light of the majority's inclusion on the privacy side of the scales consideration of any derivative use to which the disclosed information might be put. The Majority Opinion at 6472-73 (disclosure might lead to a barrage of mailings by merchandisers). As Justice Scalia noted in his separate opinion in *Roy*, "derivative use on the public-benefits side, and derivative use on the personal-privacy side must surely go together (there is no plausible reason to allow it for one and bar it for the other)." *112 S. Ct. at 551* (Scalia, J., concurring in the judgment and concurring in part).

LexisNexis®

WOODY VOINCHE, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.

Civil Action No. 95-01944 (CRR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

940 F. Supp. 323; 1996 U.S. Dist. LEXIS 14217

September 23, 1996, Decided
September 24, 1996, FILED

DISPOSITION: [**1] Defendant's Motion for Summary Judgment is GRANTED. Any and all other outstanding motions are rendered and declared Moot. The above-captioned case is DISMISSED from the dockets of this Court.

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Freedom of Information > Enforcement > Burdens of Proof
Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN1] Summary judgment must be granted to the movant if it has shown, when the facts are viewed in the light most favorable to the nonmovant, that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In Freedom of Information Act (FOIA) cases, the burden of justifying nondisclosure lies with the defendant agency, and summary judgment is in favor is appropriate only where the agency can prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the FOIA's inspection requirements.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > General Overview
Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN2] When an agency seeks summary judgment on the basis of a Freedom of Information Act exemption, it can discharge its burden by providing a relatively detailed justification, specifically identifying the reasons why a particular justification is relevant and correlating those claims with the particular part of a withheld document to which they apply. The court may grant summary judgment solely on the basis of affidavits or declarations that explain how requested information falls within a claimed exemption if the affidavits or declarations are sufficiently detailed, nonconclusory, and submitted in good faith. Still, the court must review de novo an agency's decision to exempt information. *5 U.S.C.S. § 522(a)(4)(B).*

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Foreign Policy & National Defense
Military & Veterans Law > Defense Powers > National Defense
[HN3] Exemption (b)(1) of the Freedom of Information Act protects materials specifically authorized under

criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy which are in fact properly classified pursuant to such Executive order. *5 U.S.C.S. § 552(b)(1).*

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Foreign Policy & National Defense
Administrative Law > Governmental Information > Freedom of Information > Enforcement > Vaughn Indexes
Governments > Federal Government > Domestic Security
[HN4] Vaughn declarations filed in Freedom of Information Act (FOIA) cases involving classified documents inherently require a degree of generalization and such generalization does not violate the FOIA. Furthermore, courts generally have deferred to agency expertise in national security matters.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Internal Personnel Rules
[HN5] Exemption (b)(2) of the Freedom of Information Act (FOIA) protects information related solely to the internal personnel rules and practices of an agency. *5 U.S.C.S. § 552(b)(2).* To fall within exemption (b)(2), the material withheld must be predominantly internal and its disclosure significantly risk circumvention of agency regulations or statutes. Whether there is any public interest in disclosure is irrelevant. This is because the concern in such cases is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions
Administrative Law > Governmental Information > Freedom of Information > Disclosure Requirements > General Overview
Criminal Law & Procedure > Grand Juries > Secrecy > Freedom of Information Act
[HN6] Exemption (b)(3) of the Freedom of Information Act allows for the withholding of information specifically exempted from disclosure by statute, provided the statute requires matters to be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld. *5 U.S.C.S. § 552(b)(3).*

Administrative Law > Governmental Information > Freedom of Information > General Overview
Criminal Law & Procedure > Grand Juries > Secrecy > Freedom of Information Act
[HN7] *Rule 6(e) of the Federal Rules of Criminal Procedure* prohibits the disclosure of matters which occur before grand juries, except under narrow circumstances. *Fed. R. Crim. P. 6(e).*

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files
[HN8] Under Freedom of Information Act exemption (b)(6), material may be withheld which would constitute a clearly unwarranted invasion of personal privacy. *5 U.S.C.S. § 552(b)(6).*

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files
[HN9] To warrant protection under exemption (b)(6) of the Freedom of Information Act, information must, as a threshold matter, be contained within personnel and medical files and similar files. *5 U.S.C.S. § 552(b)(6).* The protection of an individual's privacy interests surely is not intended to turn upon the label of the file which contains the damaging information. All information which applies to a particular individual meets the threshold requirement for exemption (b)(6) protection.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > General Overview
Constitutional Law > Substantive Due Process > Privacy > Personal Information
[HN10] A defendant claiming exemption under *5 U.S.C.S. § 552(b)(6)* must establish that the disclosure of the records at issue would constitute a clearly unwarranted invasion of personal privacy, which requires a balancing of the public's right to disclosure against the individual's right to privacy. The concept of "public

interest" under the Freedom of Information Act (FOIA) has been sharply limited to the core purpose for which it was enacted: to shed light on an agency's performance of its statutory duties. Information that does not directly reveal the operation or activities of the federal government falls outside the ambit of the public interest that the FOIA was created to serve.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN11] Exemption (b)(7) of the Freedom of Information Act protects investigatory records compiled for law enforcement purposes, but is limited to those records the production of which would cause one of a variety of enumerated harms. *5 U.S.C.S. § 552(b)(7).*

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Personal Information
Constitutional Law > Substantive Due Process > Privacy > Personal Information
[HN12] Exemption (b)(7)(C) of the Freedom of Information Act provides protection from disclosure to investigatory material when such disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. *5 U.S.C.S. § 552(b)(7)(C).* It is generally recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation. As such, the court is required to balance the personal privacy interests of the named individuals with the interest of the public in the disclosure of such information.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Personal Information
[HN13] Exemption (b)(7)(C) of the Freedom of Information Act, codified at *5 U.S.C.S. § 552(b)(7)(C)*, is designed to protect not only against the danger of physical harm but also against those invasions of personal privacy likely to be associated with the stigma frequently attached to law enforcement proceedings and investigations.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Confidential Source
[HN14] Exemption (b)(7)(D) of the Freedom of Information Act (FOIA) is designed to provide protection for investigatory material which could reasonably be expected to disclose the identity of a confidential source, or information furnished by a confidential source. *5 U.S.C.S. § 552 (b)(7)(D).* Exemption (b)(7)(D) has long been recognized as affording the most comprehensive protection of all of the FOIA's law enforcement exemptions. Not all information received from sources in the course of criminal investigations, however, is entitled to a presumption of confidentiality. Source confidentiality must be determined on a case-by-case basis, recognizing that it may be true that most individual sources will expect confidentiality. Thus the government must show either that a source received express assurances of confidentiality or that circumstances existed from which an inference of confidentiality can be assumed.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN15] Exemption (b)(7)(E) of the Freedom of Information Act provides for the withholding of investigatory records compiled for law enforcement purposes, the disclosure of which would reveal techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. *5 U.S.C.S. § 552(b)(7)(E).*

COUNSEL: APPEARANCES

FOR THE PLAINTIFF: Woody Voinche, pro se, Marksville, Louisiana.

FOR THE DEFENDANT: Fred E. Haynes, Assistant United States Attorney, with whom Eric H. Holder, Jr., United States Attorney, appeared on the briefs, Washington, D.C.

JUDGES: CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

OPINION BY: CHARLES R. RICHEY

OPINION

[*325] MEMORANDUM OPINION OF CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

INTRODUCTION

Before the Court in the above-entitled case are the defendant's Motion for Summary [*326] Judgment [1] the plaintiff's Opposition thereto; and the defendant's Reply. This case arises out the defendant's decision to withhold entire documents and portions of documents responsive to the plaintiff's Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*, request seeking material that had been previously released to Alexander Charns and referenced in Mr. Charns' book, *Cloak and Gavel*.

1 In its Motion for Summary Judgment, the defendant incorporates its Motion for Partial Summary Judgment, filed June 17, 1996.

[**2] The defendant has moved for summary judgment on the grounds that it has released all material responsive to the plaintiff's request except information properly withheld pursuant to various exceptions to the FOIA. Upon consideration of the filings by the parties, the entire record herein, the law applicable thereto, and for the reasons set forth below, the defendant's Motion for Summary Judgment shall be granted.

BACKGROUND

On September 23, 1993, the plaintiff sent a letter to the defendant, the Federal Bureau of Investigation ("FBI"), requesting information concerning alleged FBI wiretaps at the United States Supreme Court, "overhears" of conversations Justices had with third parties, former FBI chief, J. Edgar Hoover's official and confidential ("O & C") files, and other surveillance issues. On May 24, 1994, the defendant released 152 pages of documents to the plaintiff relating to the Supreme Court and the Judiciary. The defendant, however, withheld documents and redacted material from the pages released to the plaintiff pursuant to FOIA exemptions (b)(1); (b)(2); (b)(3); (b)(6); (b)(7)(C); (b)(7)(D) and (b)(7)(E). *See 5 U.S.C.A. §§ 552(b)(1), (2), (3), (6), (7)(C),* [**3] *(7)(D) and (7)(E) (1996).* The plaintiff appealed the decision to withhold and redact portions of documents. On October 16, 1995, having received no decision on his appeal, the plaintiff filed the above-entitled action requesting the Court to order the defendant to produce the withheld records to the plaintiff and to award costs and attorney's fees.

The parties agreed that the defendant would file *Vaughn* indices [2] explaining the basis for its withholding of documents, the first of which was filed on April 29, 1996. A status conference in the case was held on May 31, 1996, at which time the plaintiff withdrew his request for production the Hoover O & C files, since those documents were available for review at the FBI Headquarters' reading room. Also at that time, the plaintiff stated that he would not contest the defendant's withholdings that were addressed in the declarations of the FBI Special Agents filed on April 29, 1996. The defendant filed further *Vaughn* indices on June 14, 1996.

2 *Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974).*

[**4] On June 17, 1996, the defendant filed a Motion for Partial Summary Judgment. [3] After the nonexempt portions of a final outstanding document -- previously referred to the CIA for review -- were released, the defendant filed a Motion for Summary Judgment on July 1, 1996.

3 The Motion was for partial summary judgment because the declarations attached to it did not address one document that had been referred by the FBI to the CIA for a response to the plaintiff.

DISCUSSION

I. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE PLAINTIFF HAS NOT RAISED ANY GENUINE ISSUES OF MATERIAL FACT AND THE DEFENDANT PROPERLY ASSERTED FOIA EXEMPTIONS (b)(1), (b)(2), (b)(3), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E) TO JUSTIFY ITS WITHHOLDING OF DOCUMENTS.

[HN1] Summary judgment must be granted to the movant if it has shown, when the facts are viewed in the light most favorable to the nonmovant, that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Fed. R. Civ.* [**5] *P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* In FOIA [*327] cases, the burden of justifying nondisclosure lies with the defendant agency, and summary judgment in its favor is appropriate only where the agency can "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements." *National Cable Television Ass'n, Inc. v. FCC, 156 U.S. App. D.C. 91, 479 F.2d 183, 186 (D.C. Cir. 1973).*

The defendant bases its withholding of the records responsive to the plaintiff's FOIA request on Exemptions (b)(1), (b)(2), (b)(3), (b)(6), and (b)(7). [HN2] When an agency seeks summary judgment on the basis of a FOIA exemption, it can discharge its burden by providing a relatively detailed justification, "specifically identifying the reasons why a particular justification is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Central, Inc. v. Department of the Air Force, 184 U.S. App. D.C. 350, 566 F.2d 242, 251 (D.C. Cir. 1977).* The Court may grant summary judgment solely on the basis of affidavits or declarations [**6] that explain how requested information falls within a claimed exemption if the affidavits or declarations are sufficiently detailed, nonconclusory, and submitted in good faith. *Goland v. CIA, 197 U.S. App. D.C. 25, 607 F.2d 339, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1313 (1980); Military Audit Project v. Casey, 211 U.S. App. D.C. 135, 656 F.2d 724, 738 (D.C. Cir. 1981).* Still, the Court must review de novo an agency's decision to exempt information. *5 U.S.C.A. § 522(a)(4)(B) (1996).*

Consistent with the liberal treatment generally afforded *pro se* litigants, the defendant has provided notice to the plaintiff in its Motion for Summary Judgment that any factual assertions contained in the affidavits and other attachments in support of the Motion will be accepted by the Court as true unless the plaintiff submits his own affidavit or other documentary evidence contradicting such assertions. Defendant's Motion for Summary Judgment at 2; *see Neal v. Kelly, 295 U.S. App. D.C. 350, 963 F.2d 453, 456 (D.C. Cir. 1992);* Local Rule 108; *Fed. R. Civ. P. 56(e).* Notwithstanding the provision of adequate notice to the plaintiff by the [**7] defendant of the operation of the summary judgment rule, the plaintiff's documentary evidence in support of his Opposition to the defendant's Motion fails to contradict many of the factual assertions underlying the various grounds upon which the defendant's Motion rests. Accordingly, the Court must accept as true the uncontroverted allegations.

A. Exemption (b)(1) was properly asserted.

[HN3] Exemption (b)(1) protects materials "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." *5 U.S.C.A. § 552(b)(1).* In this instance, the defendant relies on Executive Order 12,958, which became effective on October 14, 1995, and which governs the classification and protection of: (a) information that would reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States; and [**8] (b) information that, if revealed, would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States. Exec. Order No. 12,958, *60 Fed. Reg. 19,825 (1995).*

Special Agent Richard D. Davidson, a supervisor in the defendant's Document Classification Unit and designated by the U.S. Attorney General as a classification and declassification authority, was given by the defendant the task of reviewing all classified documents responsive to the plaintiff's FOIA request and justifying the withholding of some of those documents based on Exemption (b)(1) through his declarations, filed with this Court on April 29 and June 14, 1996.

In his declarations, Special Agent Davidson explains in detail the analysis he applied in determining which documents or portions of documents should be withheld on the basis of Exemption (b)(1). First & Sec. Davidson Decs. PP 3-17. His declarations also state that the information in the documents withheld [*328] under Exemption (b)(1) has been properly classified and its release would harm the national interest. *Id.* at P 6.

The majority of documents [**9] withheld in this case under Exemption (b)(1) were classified in their entirety and, thus, were completely withheld from release. See Sec. Davidson Dec., App. A. The entries in Special Agent Davidson's *Vaughn* index relating to these documents are vague as to the nature of the documents or

information withheld. As a result, the indices relating to classified documents do not provide much help to the Court in reviewing *de novo* the defendant's decision to withhold the documents. In his Opposition to the defendant's Motion for Partial Summary Judgment, the plaintiff argues that these index entries are insufficient in that they are "only generalized theoretical discussion[s] of possible harms which could result from release of information." Plaintiff's Opposition to the FBI's Motion for Partial Summary Judgment; Motion for In Camera Review and to Allow Interrogatories at 1 ("Plaintiff's Opposition") (quoting *Wiener v. FBI, 943 F.2d 972, 973-74 (9th Cir. 1991)*). The plaintiff questions whether the defendant could have further segregated exempt from nonexempt materials. Plaintiff's Opposition at 2.

In isolation, the Court finds these *Vaughn* index entries troubling, given [**10] the difficulty such entries create for the Court in conducting a *de novo* review of the defendant's decision to withhold the indexed documents. However, in light of: (1) Special Agent Davidson's thorough, declarations; (2) the Department of Justice's Department Review Committee's review of Special Agent Davidson's classification determinations, *see* Sec. Davidson Dec. P 5; and (3) the defendant's *Vaughn* index entries relating to non-classified material withheld from the plaintiff, which unquestionably provide adequate detail for such *de novo* review; the Court will accept as true Special Agent Davidson's assertion that the defendant provided as much information in its *Vaughn* Index as it could about documents classified in their entirety without compromising national interests. [HN4] *Vaughn* declarations filed in FOIA cases involving classified documents inherently require a degree of generalization and such generalization does not violate the FOIA. *See, e.g., Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993).*

Furthermore, courts generally have deferred to agency expertise in national security matters, *see, e.g., Miller v. Casey, 235 U.S. App. D.C. 11, 730 F.2d 773, 776 [**11] (D.C. Cir. 1984); Taylor v. Department of the Army, 221 U.S. App. D.C. 325, 684 F.2d 99, 109 (D.C. Cir. 1982)* (classification affidavits are entitled to the "utmost deference"). This Court, too, is reluctant to substitute its judgment in place of the agency's "unique insights" in areas of national defense and foreign relations. *Krikorian v. Department of State, 299 U.S. App. D.C. 331, 984 F.2d 461, 464-65 (D.C. Cir. 1993)* (acknowledging agency's "unique insights" in areas of national defense and foreign relations). Therefore, in light of the Davidson declarations and the defendant's responsible and thorough preparation of *Vaughn* indices not involving documents classified in their entirety, the Court concludes that the defendant's invocation of exemption (b)(1) was proper, despite the vague descriptions in certain *Vaughn* index entries.

B. The Defendant Properly Asserted Exemption (b)(2).

[HN5] Exemption (b)(2) protects information "related solely to the internal personnel rules and practices of an agency." *5 U.S.C.A. § 552(b)(2).* To fall within exemption (b)(2), the material withheld must be "predominantly internal" and its disclosure "significantly risk [**12] circumvention of agency regulations or statutes." *Crooker v. Bureau of Alcohol, Tobacco & Firearms, 216 U.S. App. D.C. 232, 670 F.2d 1051, 1073-74 (1981).* Under the *Crooker* test, whether there is any public interest in disclosure is irrelevant. *See Kagnewave v. EPA, 856 F.2d 884, 888-89 (7th Cir. 1988), cert. denied, 488 U.S. 1011, 102 L. Ed. 2d 789, 109 S. Ct. 798 (1989); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. 3, 5 (D.D.C. 1987).* This is because the concern in such cases is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." *Crooker, 670 F.2d at 1053.*

In this case, the defendant asserted Exemption (b)(2) for permanent confidential [*329] source symbol numbers, file numbers, and certain manuals containing detailed discussions regarding techniques used by professional gamblers to evade prosecution. First Kelso Dec. PP 33-36; Sec. Kelso Dec. PP 33-38. In addition, the FBI withheld information relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices. *Id.* at P 39.

The Court has reviewed the declarations of Special Agent John M. Kelso, Jr. and the *Vaughn* indices [**13] prepared by him. Finding that Special Agent Kelso adequately explained the processes by which he reviewed documents for responsiveness and determined which material should be withheld under Exemption (b)(2), and satisfied with the information about the withheld material provided in the aforementioned *Vaughn* indices, the Court finds that the defendant properly asserted Exemption (b)(2).

C. The Defendant Properly Asserted Exemption

(b)(3).

[HN6] Exemption (b)(3) allows for the withholding of information specifically exempted from disclosure by statute, provided the statute (a) requires matters to be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld. *5 U.S.C.A. § 552(b)(3).*

The defendant withheld the name of an individual subpoenaed to appear before the Grand Jury, along with the time, place and the particular case. First Kelso Dec. PP 38-39. The defendant argues that releasing this information would violate the secrecy of the Grand Jury proceedings and reveal the scope and directions of the proceedings. *Id. at P 38.*

The Court agrees. [HN7] [**14] *Rule 6(e) of the Federal Rules of Criminal Procedure* prohibits the disclosure of matters which occur before Grand Juries, except under narrow circumstances inapplicable here. *F. R. Crim. P. 6(e).* Accordingly, the Court finds that the defendant properly exempted the information relating to a Grand Jury proceeding from disclosure pursuant to the FOIA.

D. The Defendant Properly Asserted Exemption (b)(6).

[HN8] Under FOIA Exemption (b)(6), material may be withheld which "would constitute a clearly unwarranted invasion of personal privacy." *5 U.S.C.A. § 552(b)(6).* The Court finds that Exemption (b)(6) was correctly asserted to protect the names and identifying information with regard to individuals and that summary judgment in favor of the defendant on this claim is appropriate.

Here, the defendant invoked Exemption (b)(6) to withhold information, including: (1) the names and initials of Special Agents and support employees; (2) the names and addresses of individuals who wrote to J. Edgar Hoover, to Justices of the Supreme Court, or to members of Congress expressing their views on some of the Supreme Court's decisions or on particular Justices; the names and identifying data of individuals [**15] mentioned during the course of routine day-to-day matters with the FBI; (4) the names and titles of Supreme Court employees and applicants; (5) the names of non-federal law enforcement officers; (6) the names of non-FBI federal government employees; (7) and the names and identifying data of possible candidates for vacancies on the Supreme Court. First & Sec. Kelso Decs. PP 40-49.

[HN9] To warrant protection under Exemption (b)(6), information must, as a threshold matter, be contained within "personnel and medical files and similar files." *5 U.S.C.A. § 552(b)(6).* As the Supreme Court noted in *Department of State v. Washington Post Co., 456 U.S. 595, 72 L. Ed. 2d 358, 102 S. Ct. 1957 (1982)*, the protection of an individual's privacy interests "surely was not intended to turn upon the label of the file which contains the damaging information." *Id. at 601* (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). It held, rather, that all information which "applies to a particular individual" meets the threshold requirement for Exemption (b)(6) protection. *Id. at 602.* The defendant asserts Exemption (b)(6) to protect the names and identifying data of specific individuals, and, thus, has met the threshold requirement. [**16] [HN10]

[*330] The defendant also must establish that the disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy," which requires a balancing of the public's right to disclosure against the individual's right to privacy. *See Department of the Air Force v. Rose, 425 U.S. 352, 372, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976).* Because the release of the names and identifying features of individuals withheld would serve no articulable public interest, the Court finds that the defendant's assertion of Exemption (b)(6) in order to protect the privacy interests of the individuals at issue was correct.

The Supreme Court has sharply limited the concept of "public interest" under the FOIA to the core purpose for which it was enacted: to "shed [] light on an agency's performance of its statutory duties." *Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989).* ¶ Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id. at 775; see Andrews v. Department [**17] of Justice, 769 F. Supp. 314, 317 (E.D. Mo. 1991)* ("The nature of the public interest inquiry under the FOIA . . . turns on the relationship of the information to the basic purpose of the FOIA, which is 'to open agency action to the light of public scrutiny.") (quoting

Reporter's Comm., 489 U.S. at 772) (quoting *Rose, 425 U.S. at 372*).

4. / On September 17, 1996, both houses of Congress passed a bill that amends the FOIA to effectively overrule the U.S. Supreme Court's holding in *Reporters Comm.* The amendment clarifies that "the information collected by federal agencies is subject to release for any public or private purpose, as long as it does not conflict with the existing exemptions." In Chinoy, *Amendment Seeks to Open Public Files to Digital Diggers*, Washington Post, September 18, 1996 at A17; *see Electronic Freedom of Information Act Amendments of 1996*, H.R. 3802, 104th Cong., 2d Sess. (1996). The President had not signed the bill into law as of the date of this Memorandum Opinion.

[**18] The information withheld in this case under Exemption (b)(6) consists entirely of names and identifying data of individuals. *See* First & Sec. Kelso Decs. PP 40-49. There is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities of FBI Special Agents and support personnel, private citizens who wrote to government officials, non-federal law enforcement officers, non-FBI federal employees or candidates for vacancies on the U.S. Supreme Court. Accordingly, in light of the countervailing privacy interests of third parties about whom personal information is contained in the requested records, the Court finds that the defendant properly asserted Exemption (b)(6). The Court therefore shall grant the defendant's Motion for Summary Judgment with regard to their assertion of Exemption (b)(6) to withhold requested information.

E. The Defendant Properly Asserted Exemption (b)(7).

The defendant also withholds certain information from release to the plaintiff under three subsections of Exemption (b)(7) of the FOIA. [HN11] Exemption (b)(7) protects "investigatory records compiled for law enforcement purposes," but [**19] is limited to those records the production of which would cause one of a variety of enumerated harms. *5 U.S.C.A. § 552(b)(7)*.

1. Exemption (b)(7)(C).

[HN12] Exemption (b)(7)(C) provides protection from disclosure to investigatory material when such disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C.A. § 552(b)(7)(C) (1996)*. "It is generally recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Branch v. FBI, 658 F. Supp. 204, 209 (D.D.C. 1987); see also Lesar v. Department of Justice, 204 U.S. App. D.C. 200, 636 F.2d 472, 488 (D.C. Cir. 1980)*. As such, the Court is required to balance the personal privacy interests of the named individuals with the interest of the public in the disclosure of such information. *Reporters Comm., 489 U.S. at 762*; [*331] *Stern v. FBI, 237 U.S. App. D.C. 302, 737 F.2d 84, 91 (D.C. Cir. 1984)*.

In this case, the defendant asserts that information in investigatory material has been withheld from the plaintiff under Exemption (b)(7)(C) because it consists of: (1) the names and initials of [**20] Special Agents and support personnel of the FBI; (2) the names and identifying data of third parties of investigative interest; (3) the names and identifying data of non-FBI federal government employees; (4) the names of employees of the Supreme Court who provided information in connection with their employment; (5) the names and identifying data of third parties mentioned during the course of interviews or contacts with third parties and toward whom no investigative effort was directed; (6) the name and title of an individual who, by reason of his employment, was in a position to furnish information concerning the investigation of the alleged attempt to sell advance opinions of the U.S. Supreme Court; (7) the names and identifying data of third parties interviewed about then-Governor Earl Warren and some of his associates; and (8) the names and identifying data of an individual who corresponded with the FBI regarding Justice Warren. The nature of the withholdings under Exemption (b)(7)(C) and the privacy interests at stake are explained in detail in the April 29 and June 14, 1996 declarations of Special Agent John D. Kelso, Jr. First Kelso Dec. PP 51-69; Second Kelso Dec. PP 51 to [**21] 67.

[HN13] Exemption (b)(7)(C) is designed to protect not only against the danger of physical harm but also against those invasions of personal privacy likely to be associated with the stigma frequently attached to law enforcement proceedings and investigations. Given the

strong privacy interest inherent in law enforcement records, and the absence of a "significant and compelling" public interest in disclosing the names of individuals associated with, or the focus of, FBI investigations referenced in the withheld material, the Court finds that the defendant properly asserted Exemption (b)(7)(C). *See SafeCard Servs., Inc. v. SEC, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1206 (D.C. Cir. 1991)* ("We now hold categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.") Satisfied with the declarations of Special Agent Kelso and the *Vaughn* indices as they relate to information withheld pursuant to Exemption (b)(7)(C), the Court shall grant the defendant summary [**22] judgment with respect to its assertion of that exemption to the FOIA.

2. Exemption (b)(7)(D).

[HN14] Exemption (b)(7)(D) is designed to provide protection for investigatory material which "could reasonably be expected to disclose the identity of a confidential source, . . . or . . . information furnished by a confidential source." *5 U.S.C.A. § 552 (b)(7)(D)*. Exemption (b)(7)(D) has long been recognized as affording the most comprehensive protection of all of the FOIA's law enforcement exemptions. *See Irons v. FBI, 880 F.2d 1446, 1452 (1st Cir. 1989)* (en banc). Not all information received from sources in the course of criminal investigations, however, is entitled to a presumption of confidentiality. *United States Department of Justice v. Landano, 508 U.S. 165, 124 L. Ed. 2d 84, 113 S. Ct. 2014 (1993)*. In *Landano*, the U.S. Supreme Court ruled that source confidentiality must be determined on a case-by-case basis, recognizing that it may be true that most individual sources will expect confidentiality. *See id. at 176*. Thus, under *Landano*, the government must show either that a source received express assurances of confidentiality or that circumstances existed from [**23] which an inference of confidentiality can be assumed.

Applying the analysis of *Landano* to the information withheld in this case pursuant to Exemption (b)(7)(D), the Court finds that the defendant adequately showed that each individual whose name or identifying data was withheld received an express or implied assurance of confidentiality. [5] First Kelso Dec. [*332] PP 73-82; Sec. Kelso Dec. PP 71-88. Accordingly, the Court shall grant the defendant's Motion for Summary Judgment with regard to their withholding of information relating to the identity of sources given a promise of confidentiality.

5 In fact, the name and identifying data of only one individual -- a person with whom Justice William O. Douglas associated -- was withheld based on an *implied* promise of confidentiality. Sec. Kelso Dec. PP 79-83. The defendant has provided sufficient detail of the circumstances around the individual's interaction with the FBI to establish that the individual at issue had no expectation of confidentiality as to his or her relationship with the FBI, even though the promise of confidentiality was not explicitly expressed.

[**24] 3. Exemption (b)(7)(E).

[HN15] Exemption (b)(7)(E) provides for the withholding of investigatory records compiled for law enforcement purposes, the disclosure of which would reveal "techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *5 U.S.C.A. § 552(b)(7)(E)*. The defendant has invoked this exemption to withhold copies of the "Criminal Intelligence Digest," a publication prepared to render assistance and guidance to FBI personnel, and information relating to an analysis of safety procedures afforded to the Supreme Court and its Justices. Sec. Kelso Dec. PP 89-90.

The defendant also invoked Exemption (b)(2) as a basis for withholding this material, which the Court, *supra* I.B., found an appropriate action. Nonetheless, for the same reasons the materials may be withheld under Exemption (b)(2), the Court finds that the materials also should be afforded protection from disclosure pursuant to Exemption (b)(7)(E).

CONCLUSION

Upon consideration of the defendant's Motion for Summary Judgment, which incorporates by reference its earlier Motion for Partial Summary Judgment, [**25] the plaintiff's Opposition thereto, the defendant's Reply thereto, the declarations of Special Agents Davidson and Kelso and accompanying *Vaughn* indices, and for all of

the foregoing reasons, the Court finds that the defendant is entitled to judgment in its favor as a matter of law. [6] As such, the Court shall issue an Order of even date herewith consistent with the foregoing Memorandum Opinion.

6 Because the Court finds that the defendant is entitled to judgment as a matter of law based on the *Vaughn* indices provided, the Court rejects the plaintiff's argument in his Opposition that discovery and *in camera* review of the documents is necessary to a proper resolution of this matter. Accordingly, the Court declares moot in its Order of even date herewith the plaintiff's motions for such relief.

CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons articulated in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 23rd day of September, 1996,

ORDERED [**26] that the defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED; and, it is

FURTHER ORDERED that any and all other outstanding motions shall be, and hereby are, rendered and declared Moot; and, it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

ARTICLE XV: ETHICS

Sec. 15.100. Ethics Commission.
Sec. 15.101. Executive Director and Commission Staff.
Sec. 15.102. Rules and Regulations.
Sec. 15.103. Conflict of Interest.
Sec. 15.105. Suspension and Removal.
Sec. 15.107. Repealing of Campaign Financing.

SEC. 15.100. ETHICS COMMISSION.

The Ethics Commission shall consist of five members who shall serve six-year terms; provided that the first five commissioners to be appointed to take office on the first day of February, 2003 shall serve staggered terms so that the term of one commissioner shall expire at 12:00 o'clock noon on each of the second, third, fourth, fifth and sixth anniversaries of such date, respectively; and, on the expiration of those said successive terms of office, the appointments shall be made for six-year terms.

The Mayor, the Board of Supervisors, the City Attorney, the District Attorney and the Assessor each shall appoint one member of the Commission. The member appointed by the Mayor shall have a background in public information and public meetings. The member appointed by the City Attorney shall have a background in law as it relates to government ethics. The member appointed by the Assessor shall have a background in campaign finance. The members appointed by the District Attorney and Board of Supervisors shall be broadly representative of the general public.

In the event a vacancy occurs, the officer who appointed the member vacating the office shall appoint a qualified person to complete the remainder of the term. Members of the Commission shall serve without compensation. Members of the Commission shall be officers of the City and County, and may be removed by the appointing authority only pursuant to Section 15.105.

No person may serve more than one six-year term as a member of the Commission, provided that persons appointed to fill a vacancy for an unexpired term with less than three years remaining or appointed to an initial term of three or fewer years shall be eligible to be appointed to one additional six-year term. Any term served before the effective date of this Section shall not count toward a member's term limit. Any person who completes a term as a Commissioner shall be eligible for reappointment six years after the expiration of his or her term. Notwithstanding any provisions of this Section or any other section of the Charter to the contrary, the respective terms of office of the members of the Commission who shall hold office on the first day of February, 2003, shall expire at 12 o'clock noon on said date, and the five persons appointed as members of the Commission as provided in this Section shall succeed to said offices on said first day of February, 2003, at 12 o'clock noon; provided that if any appointing authority has not made a new appointment by such date, the sitting member shall continue to serve until replaced by new appointee.

During his or her tenure, members and employees of the Ethics Commission are subject to the following restrictions:

(a) Restrictions on Holding Office. No member or employee of the Ethics Commission may hold any other City or County office or be an officer of a political party.

(b) Restrictions on Employment. No member or employee of the Ethics Commission may be a registered lobbyist or campaign consultant, or be employed by or receive gifts or other compensation from a registered lobbyist or campaign consultant. No member of the Ethics Commission may hold employment with the City and County and no employee of the Commission may hold any other employment with the City and County.

(c) Restrictions on Political Activities. No member or employee of the Ethics Commission may participate in any campaign supporting or opposing a candidate for City elective office, a City ballot measure, or a City officer running for any elective office. For the purposes of this section, participation in a campaign includes but is not limited to making contributions or soliciting contributions to any committee within the Ethics Commission's jurisdiction, publicly endorsing or urging endorsement of a candidate or ballot measure, or participating in decisions by organizations to participate in a campaign.

The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers.

(Amended November 2001; November 2002; November 2003)

SEC. 15.101. EXECUTIVE DIRECTOR AND COMMISSION STAFF.

The Commission shall appoint and may remove an Executive Director. The Executive Director shall have a background in campaign finance, public information and public meetings and the law as it relates to governmental ethics. The Executive Director shall be the chief executive of the department and shall have all the powers provided for department heads. Subject to the civil service provisions of this Charter, the Executive Director shall have the power to appoint and remove other employees of the Commission. In addition to any other conflict of interest provisions applicable to City employees, the Executive Director and all other employees of the Commission shall be subject to the conflict of interest provisions in Section 15.105, except that the post-employment restrictions contained therein shall apply only to the Executive Director and management-level employees.

(Amended November 2001)

SEC. 15.102. RULES AND REGULATIONS.

The Commission may adopt, amend and rescind rules and regulations consistent with and related to carrying out the purposes and provisions of this Charter and ordinances related to campaign finances, conflicts of interest, lobbying, campaign consultants and governmental ethics and to govern procedures of the Commission. In addition, the Commission may adopt rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records. The Commission shall transmit to the Board of Supervisors rules and regulations adopted by the Commission within 24 hours of their adoption. A rule or regulation adopted by the Commission shall become effective 60 days after the date of its adoption unless before the expiration of this 60- day period two-thirds of all members of the Board of Supervisors vote to veto the rule or regulation.

The City Attorney shall be the legal advisor of the Commission.

Any ordinance which the Supervisors are empowered to pass relating to conflicts of interest, campaign finance, lobbying, campaign consultants or governmental ethics may be submitted to the electors at the next succeeding general election by the Ethics Commission by a four-fifths vote of all its members.

(Amended November 2001)

SEC. 15.103. CONFLICT OF INTERSST.

Public office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust. The City may adopt conflict of interest and governmental ethics laws to implement this provision and to prescribe penalties in addition to discipline and removal as provided in this Charter. All officers and employees of the City and County shall be subject to such conflict of interest and governmental ethics laws and the penalties prescribed by such laws.

(Amended November 2003)

SEC. 15.104.

(Repealed November 2003)

SEC. 15.105. SUSPENSION AND REMOVAL.

(a) ELECTIVE AND CERTAIN APPOINTED OFFICERS. Any elective officer, and any member of the Airport Commission, Asian Art Commission, Civil Service Commission, Commission on the Status of Women, Golden Gate Concourse Authority Board of Directors, Health Commission, Human Services Commission, Juvenile Probation Commission, Municipal Transportation Agency Board of Directors, Port Commission, Public Utilities Commission, Recreation and Park Commission, Fine Arts Museums Board of Trustees, Taxi Commission, War Memorial and Performing Art Center Board of Trustees, Board of Education or Community College Board is subject to suspension and removal for official misconduct as provided in this section. Such officer may be suspended by the Mayor and the Mayor shall appoint a qualified person to discharge the duties of the office during the period of suspension. Upon such suspension, the Mayor shall immediately notify the Ethics Commission and Board of Supervisors thereof in writing and the cause thereof, and shall present written charges against such suspended officer to the Ethics Commission and Board of Supervisors at or prior to their next regular meetings following such suspension, and shall immediately furnish a copy of this user to such officer, who shall have the right to appear with counsel before the Ethics Commission in his or her defense. The Ethics Commission shall hold a hearing not less than five days after the filing of written charges. After the hearing, the Ethics Commission shall transmit the full record of the hearing to the Board of Supervisors with a recommendation as to whether the charges should be sustained. If, after reviewing the complete record, the charges are sustained by not less than a three-fourths vote of all members of the Board of Supervisors, the suspended officer shall be removed from office; if not so sustained, or if not acted on by the Board of Supervisors within 30 days after the receipt of the record from the Ethics Commission, the suspended officer shall thereby be reinstated.

(b) BUILDING INSPECTION COMMISSION, PLANNING COMMISSION, BOARD OF APPEALS, ELECTIONS COMMISSION, ETHICS COMMISSION, AND ENTERTAINMENT COMMISSION. Members of the Building Inspection Commission, the Planning Commission, the Board of Appeals, the Elections Commission, the Ethics Commission, and the Entertainment Commission may be suspended and removed pursuant to the provisions of subsection (a) of this section except that the Mayor may initiate removal only at the Mayor's appointees and the appointing authority shall act in place of the Mayor for all other appointees.

(c) REMOVAL FOR CONVICTION OF A FELONY CRIME INVOLVING MORAL TURPITUDE.

(1) Officers Enumerated in Subsections (b) and (b).

(A) An appointing authority must immediately remove from office any official enumerated in subsections (a) or (b) upon:

(i) a court's final conviction of that official of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the official was convicted warrants removal.

(B) For the purposes of this subsection, the Mayor shall act as the appointing authority for any elective official.

(C) Removal under this subsection is not subject to the procedures in subsections (a) and (b) of this section.

(2) Other Officers and Employees.

(A) As to all appointees. Officers and employees who hold their positions at the pleasure of their appointing authority must be removed upon:

(i) a final conviction of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(B) For issues appointees. Officers and employees who by law may be removed only for cause must be removed upon:

(i) a final conviction of a felony crime involving moral turpitude; and

(ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(3) Penalty for Failure to Remove. Failure to remove an appointee as required under this subsection shall be official misconduct.

(d) DISQUALIFICATION.

(1) (A) Any person who has been removed from any federal, state, County or City office or employment upon a final conviction of a felony crime involving moral turpitude is ineligible for election or appointment to City office or employment for a period of ten years after removal.

(B) Any person removed from any federal, state, County or City office or employment for official misconduct shall be ineligible for election or appointment to City office or employment for a period of five years after removal.

(2) (A) Any City department head, board, commission or other appointing authority that removes a City officer or employee from office or employment on the grounds of official misconduct must invoke the disqualification provision in subsection (d)(1)(B) and provide notice of such disqualification in writing to the City officer or employee.

(B) Upon the request of any former City officer or employee, the Ethics Commission may, after a public hearing, overturn the application of the disqualification provision of subsection (d)(1)(B) if: (i) the decision that the former officer or employee engaged in official misconduct was not made after a hearing by a court, the Board of Supervisors, the Ethics Commission, an administrative body, an administrative hearing officer, or a labor arbitrator; and (ii) if the officer or employee does not have the right to appeal his or her restriction on holding future office or employment to the San Francisco Civil Service Commission.

(e) OFFICIAL MISCONDUCT. Official misconduct means any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action implicitly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. Where any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

(Amended November 2001; March 2002; November 2003)

SEC. 15.106.

(Repealed November 2003)

SEC. 15.107. REPORTING OF CAMPAIGN FINANCING.

The Board of Supervisors shall, by ordinance, prescribe requirements for campaign contributions and expenditures and any limitations thereon with respect to candidates for elective office and ballot measures in the City and County.

SEC. 15.108.

(Repealed November 2002)

APPENDIX B

SUNSHINE ORDINANCE
TASK FORCE

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. (415) 554-7724
Fax No. (415) 554-7854
TDD/TTY No. (415) 554-5227

FILED
SAN FRANCISCO
ETHICS COMMISSION
2014 MAR 4 PM 2:16

March 3, 2014

San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Sunshine Ordinance Task Force (SOTF) referral to the Ethics Commission – Dominic Maionchi against Phil Ginsburg, General Manager, Recreation and Park Department (Sunshine Ordinance Complaint No. 12058)

Dear Ethics Commission:

On May 1, 2013, the Task Force heard Complaint No. 12058, by Dominic Maionchi (Complainant) against Recreation and Parks Department (Respondent). The Complainant alleged that the Recreation and Parks Department failed to timely respond to his November 22, 2012, records request, and that they also failed to provide unredacted copies of the records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

Dominic Maionchi appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented the department's defense. The issue in the case was whether the Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

Based on the testimony and evidence presented, the Task Force found the testimony of Complainant to be persuasive and finds Sections 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find testimony provided by the Respondent persuasive with regard to alleged violation of Section 67.26. An Order of Determination was issued on June 12, 2013.

At the July 16, 2013, Compliance and Amendments Committee Mr. Maionchi provided an update on the June 12, 2013, Order of Determination from the May 1, 2013, SOTF meeting. Mr. Maionchi stated that the Respondent provided the same documents provided in original records request, which do not comply with the Order of Determination. Olive Gong, Recreation and Park (Respondent), stated the California

Government Code upholds the department's decision to redact documents provided to the Complainant and not disclose others.

Member Knee, seconded by Member Grant, moved to refer the matter back to the Task Force with a recommendation of referral to Ethics Commission for enforcement for violating Sunshine Ordinance Sections 67.34, 67.26 and 67.21(l); for the Chair to draft a letter to the City Attorney stating the Recreation and Park's attorney is in violation of Sunshine Ordinance Section 67.21 (l).

At the November 6, 2013, SOTF meeting Mr. Maionchi provided an update and overview of the complaint. Olive Gong, Recreation and Park (Respondent), provided an overview of Recreation and Park's defense; reiterating the department is not in violation according to their interpretation and the department policy to not disclose addresses.

Member Knee, seconded by Member Oke, moved to find the Recreation and Perk Department in violation of the Sunshine Ordinance as determined in the Order of Determination (Sections 67.21(e), 67.24(g) and 67.34); referral to the Ethics Commission for enforcement specifically naming Phil Ginsburg, Director, Recreation and Park Department responsible.

This request and referral is made under Section 67.30(c) whereby the Task Force shall make referrals to a municipal office with enforcement power under the Sunshine Ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this Ordinance or the Acts.

Thank you for your timely attention to this matter. A description of the Task Force hearing, violations found, and decision are described in the attached Order of Determination. Please contact the Sunshine Ordinance Task Force Administrator at sotf@sfgov.org or (415) 554-7724 with any questions or concerns.

Kitt Grant, Chair
Sunshine Ordinance Task Force

Encl.

c: Dominic Maionchi, Complainant
Olive Gong, Recreation and Park Department
Phil Ginsburg, General Manager, Recreation and Park Department
Nicholas Colla , Deputy City Attorney
Jerry Threet, Deputy City Attorney

CITY AND COUNTY OF SAN FRANCISCO

SUNSHINE ORDINANCE TASK FORCE

ORDER OF DETERMINATION
June 12, 2013

FILED
14 MAR -3 PM 2:47
SAN FRANCISCO ETHICS COMMISSION
BY

DATE THE DECISION ISSUED
May 1, 2013

DOMINIC MAIONCHI V. RECREATION AND PARKS DEPARTMENT (CASE NO. 12058)

FACTS OF THE CASE

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2012 records request, and that they also failed to provide unredacted copies of the records requested.

COMPLAINT FILED

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(l) of the Ordinance.

HEARING ON THE COMPLAINT

On May 1, 2013, Complainant, Dominic Maionchi appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented Recreation and Park Department's defense.

The issue in the case is whether Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force finds that the testimony of Complainant, Dominic Maionchi to be persuasive and finds that Section 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find the testimony provided by Respondent, Olive Gong persuasive with regard to alleged violation of Section 67.26.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that Recreation and Park Department violated Section 67.26 of the Sunshine Ordinance for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 16, 2013.

City Hall • 1 Dr. Carlton B. Goodlett Place • Room 244 • San Francisco, CA 94102-4689
(415) 554-7724 • Fax (415) 554-7854 • TDD/TTY No. (415) 554-5227

CITY AND COUNTY OF SAN FRANCISCO SUNSHINE ORDINANCE TASK FORCE

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 1, 2013, by the following vote: (Knee / Hyland)
Ayes: Knee, Pilpel, Sims, Hyland, Oko, Fischer, Grant
Noes: Dovid
Absent: Washburn

Kitt Grant, Chair
Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney
Dominic Maionchi, Complaint
Olive Gong, Recreation and Park Department, Respondent

Argumedo, Catherine

From: Ethics Commission
Sent: Monday, March 03, 2014 2:28 PM
To: Argumedo, Catherine; Chatfield, Garrett
Subject: FW: SOTF - Referral of Sunshine Ordinance Complaint No. 13013 to the Ethics Commission
Attachments: Referral 12058.pdf

From: SOTF
Sent: Monday, March 03, 2014 2:26 PM
To: Ethics Commission
Cc: Calla, Nicholas; Threet, Jerry; St.Croix, John; Gong, Olive; Ginsburg, Phil; dm567@pacbell.net; Calvillo, Angela
Subject: SOTF - Referral of Sunshine Ordinance Complaint No. 13013 to the Ethics Commission

Dear Ethics Commission:

Please find attached a referral from the Sunshine Ordinance Task Force to the Ethics Commission in regards to Complaint No. 13013 - Dominic Maionchi against Phil Ginsburg, General Manager, Recreation and Park Department.

Victor Young
Administrator
Sunshine Ordinance Task Force
1 Dr. Carlton B. Goodlett Pl., Room 244
San Francisco CA 94102
phone 415-554-7724
fax 415-554-5163

Complete a Board of Supervisors Customer Satisfaction form by clicking the link below.
http://www.sfbos.org/index.aspx?page=104

Disclosures: Personal information that is provided in communications to the Board of Supervisors is subject to disclosure under the California Public Records Act and the San Francisco Sunshine Ordinance. Personal information provided will not be redacted. Members of the public are not required to provide personal identifying information when they communicate with the Board of Supervisors and its committees. All written or oral communications that members of the public submit to the Clerk's Office regarding pending legislation or hearings will be made available to all members of the public for inspection and copying. The Clerk's Office does not redact any information from these submissions. This means that personal information—including names, phone numbers, addresses and similar information that a member of the public elects to submit to the Board and its committees—may appear on the Board of Supervisors website or in other public documents that members of the public may inspect or copy.

Victor Young
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SUNSHINE ORDINANCE TASK FORCE
CITY AND COUNTY OF SAN FRANCISCO
AGENDA

Hearing Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

May 1, 2013 – 4:00 PM

Regular Meeting

1. CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES

Seat 1	*(Vacant)*	Seat 8	Todd David
Seat 2	Richard Knee *(Hold Over)*	Seat 9	Chris Hyland
Seat 3	Kitt Grant – Chair	Seat 10	Louise Fischer – Vice Chair
Seat 4	*(Vacant)*	Seat 11	Bruce Oka
Seat 5	Allyson Washburn *(Hold Over)*		
Seat 6	David Pilpel	Ex-officio	Angela Calvillo
Seat 7	David Sims	Ex-officio	*(Vacant)*

2. Supervisor of Records Report – Presented by Paula Jesson, Deputy City Attorney. *(Discussion and Action) (approximately 30 minutes) (attachment)*

3. Public Comment: Members of the public may address the Sunshine Ordinance Task Force (SOTF) on matters that are within SOTF's jurisdiction, but not on today's agenda. (No Action) *Public comment shall be taken at 5:00 pm or as soon thereafter as possible.*

4. File No. 12058: Complaint filed by Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. *(approximately 45 minutes) (Discussion and Action)*

5. *File No. 13007: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*

6. File No. 13008: Complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15. *(approximately 45 minutes) (Discussion and Action)*

7. *File No. 13022: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*

8. *File No. 13023: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by Charles Pitts Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*

9. Discussion regarding possible motion on state budget proposals regarding: 1) increasing court record access fees; and 2) halting State reimbursements that assist local governments in complying with the California Public Records Act. *(approximately 15 minutes) (Discussion and Action) (attachment)*

10. Discussion regarding proposed Resolution to Mayor Edwin Lee and the Board of Supervisors to: 1) communicate to the Governor and San Francisco's State Legislative representatives their opposition to State budget proposals that would grievously abridge the public's right to know by increasing court record access fees and halting state reimbursements that assist local governments in complying with the California Public Records Act; and 2) to instruct the City's legislative representative in the State Capitol to work diligently to persuade the Governor and the Legislature to delete/defeat said proposals. *(approximately 15 minutes) (Discussion and Action) (attachment)*

11. Approval of Minutes from the November 7, 2012, Regular Meeting. *(approximately 5 minutes)* (Action) *(attachment)*

12. Approval of Minutes from the December 5, 2012, Regular Meeting. *(approximately 5 minutes)* (Action) *(attachment)*

13. Approval of Minutes from the December 12, 2012, Special Meeting. *(approximately 5 minutes)* (Action) *(attachment)*

14. Approval of Minutes from the January 16, 2013 Special Meeting. *(approximately 5 minutes)* (Action) *(attachment)*

15. Approval of Minutes from the February 6, 2013 Regular Meeting. *(approximately 5 minutes)* (Action) *(attachment)*

16. Approval of Minutes from the March 6, 2013 Regular Meeting. *(approximately 5 minutes)* (Action) *(attachment)*

17. Approval of Minutes from the April 3, 2013 Regular Meeting. *(approximately 5 minutes)* (Action) *(attachment)*

18. Report: Compliance and Amendments Committee meeting of April 16, 2013. *(approximately 5 minutes)* (Discussion)

19. Report: Education, Outreach and Training Committee meeting of April 29, 2013. *(approximately 5 minutes)* (Discussion)

20. Administrator's Report. *(approximately 5 minutes)* (Discussion)

21. Announcements, Comments, Questions, and Future Agenda Items. *(approximately 10 minutes)* (Discussion and Action)

22. ADJOURNMENT

Agenda Item Information

Each item on the agenda may include: 1) Department or Agency cover letter and/or report; 2) Public correspondence; 3) Other explanatory documents. For more information concerning agendas, minutes, and meeting information, such as these documents, please contact the SOTF Clerk, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco, CA 94102.

Audio recordings of the meeting of the Sunshine Ordinance Task Force are available at: http://www.sfbos.org/index.aspx?page=2811

For information concerning Sunshine Ordinance Task Force please contact by e-mail sotf@sfgov.org or by calling (415) 554-7724.

Public Comment

Public Comment will be taken before or during the Committee's consideration of each agenda item. Speakers may address the Task Force for up to three minutes on that item. During General Public Comment, members of the public may address the Task Force on matters that are within the Task Force's jurisdiction and are not on the agenda. Any person speaking during a public comment period may supply a brief written summary of their comments, which shall, if no more than 150 words, be included in the official file.

Each member of the public will be allotted the same maximum number of minutes to speak as set by the Chair at the beginning of each item, excluding persons requested by the Task Force to make presentations.

Each member of the public who is unable to attend the public meeting or hearing may submit to the City, by the time the hearing begins, written comments regarding the subject of the meeting or hearing;. These comments will be made a part of the official public record.

Hearing Procedures

1.	Complainant presents his/her facts and evidence	5 minutes
	Other parties of Complainant present facts and evidence	Up to 3 minutes each
2.	City responds	5 minutes
	Other parties of City respond	Up to 3 minutes each
	Above total speaking times for Complainant and City to be the same.	
3.	Matter is with the Task Force for discussion and questions.	
4.	Respondent and Complainant presents clarification/rebuttal	3 minutes
5.	Matter is with the Task Force for motion and deliberation.	
6.	Public comment (Excluding Complainant & City response, witnesses)	Up to 3 minutes each
7.	Vote by Task Force (Public comment at discretion of chair on new motion and/or on new motion if vote fails.)	

Note: Time must be adhered to. If a speaker is interrupted by questions, the interruption does not count against his/her time.

Disability Access

The hearing rooms in City Hall are wheelchair accessible. Assistive listening devices for the hearing rooms are available upon request with the SOTF Clerk. The nearest accessible BART station is Civic Center (Market/Grove/Hyde Streets). Accessible MUNI Metro lines are the F, J, K, L, M, N, T (exit at Civic Center or Van Ness Stations). MUNI bus lines also serving the area are the 5, 6, 9, 19, 21, 47, 49, 71, and 71L. For more information about MUNI accessible services, call (415) 701-4485. There is accessible parking in the vicinity of City Hall at Civic Center Plaza and adjacent to Davies Hall and the War Memorial Complex. Accessible curbside parking is available on Dr. Carlton B. Goodlett Place and Grove Street.

The following services are available on request 48 hours prior to the meeting; except for Monday meetings, for which the deadline shall be 4:00 p.m. of the last business day of the preceding week: For American sign language interpreters or the use of a reader during a meeting, a sound enhancement system, and/or alternative formats of the agenda and minutes, please contact the SOTF Clerk at (415) 554-7724 to make arrangements for the accommodation. Late requests will be honored, if possible.

In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

Know Your Rights Under the Sunshine Ordinance

Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils, and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

For more information on your rights under the Sunshine Ordinance (Chapter 67 of the San Francisco Administrative Code) or to report a violation of the ordinance, contact: Sunshine Ordinance Task Force, 1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco, CA 94102; phone (415) 554-7724; fax (415) 554-7854; or email sotf@sfgov.org.

Citizens may obtain a free copy of the Sunshine Ordinance by printing Chapter 67 of the San Francisco Administrative Code on the Internet, at http://www.sfbos.org/sunshine.

Cell Phones, Pagers and Similar Sound-Producing Electronic Devices

The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. Please be advised that the Chair may order the removal from the meeting room of any person(s) responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices (Chapter 67A of the San Francisco Administrative Code).

Lobbyist Registration and Reporting Requirements

Individuals and entities that influence or attempt to influence local legislative or administrative action may be required by the San Francisco Lobbyist Ordinance [SF Campaign & Governmental Conduct Code §2.100, et. seq] to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at: 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102; telephone (415) 581-3100; fax (415) 252-3112; web site www.sfgov.org/ethics

**Complainant requested the complaints within Complaint No. 13007 to be heard separately.* *Page 6*

SUNSHINE ORDINANCE TASK FORCE
Compliance and Amendments Committee
CITY AND COUNTY OF SAN FRANCISCO
AGENDA

Hearing Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

July 16, 2013 – 4:00 P.M.

Regular Meeting

Members: Allyson Washburn (Chair),
Richard Knee, Kitt Grant

1. **CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES**
2. Adoption of June 18, 2013, regular meeting minutes (Discussion and Action) *(attachment) (approximately 5 minutes)*
3. File No. 12058: Hearing on the status of the Order of Determination of Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. (Discussion and Action) *(attachment) (approximately 30 minutes)*
4. Public Comment Members of the public may address the Compliance and Amendments Committee on matters that are within Sunshine Ordinance Task Force's jurisdiction but not on today's agenda. (No Action). Public Comment shall be taken one hour after meeting convenes.
5. Administrator's Report (Discussion and Action) *(approximately 5 minutes)*
6. Announcements, Comments, Questions, and Future Agenda Items (No Action)
7. **ADJOURNMENT**

Agenda Item Information

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Public Comment

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Full Packet

SUNSHINE ORDINANCE TASK FORCE
CITY AND COUNTY OF SAN FRANCISCO
AGENDA

Hearing Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

November 6, 2013 – 4:00 PM

Regular Meeting

1. CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES

Seat 1	*(Vacant)*	Seat 8	Todd David
Seat 2	Richard Knee *(Hold Over)*	Seat 9	Chris Hyland
Seat 3	Kitt Grant – Chair	Seat 10	Louise Fischer – Vice Chair
Seat 4	*(Vacant)*	Seat 11	Bruce Oka *(Hold Over)*
Seat 5	Allyson Washburn *(Hold Over)*		
Seat 6	David Pilpel	Ex-officio	Angela Calvillo
Seat 7	David Sims	Ex-officio	*(Vacant)*

2. Proposed Sunshine Ordinance Task Force Records Retention Schedule: The Task Force shall prepare, maintain and adopt a records retention and destruction policy as provided in §8.3 of the San Francisco Administrative Code. *(approximately 30 minutes) (Discussion and Possible action) (attachment)*

3. Pending Complaints and 45-Day Hearing Rule - Scheduling of Complaints. *(approximately 30 minutes) (Discussion and Possible action)*

4. File No. 12058: The Compliance and Amendments Committee has referred File No. 12058, Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. *(approximately 30 minutes) (Discussion and Possible action) (attachment)*

5. File No. 12059: The Compliance and Amendments Committee has referred File No. 12059, Supreet Pabla, SEIU Local 1021 against Human Services Agency for allegedly failing to provide records requested relevant to the representation of the bargaining unit's employees. *(approximately 30 minutes) (Discussion and Possible action) (attachment)*

6. Public Comment: Members of the public may address the Sunshine Ordinance Task Force (SOTF) on matters that are within SOTF's jurisdiction, but not on today's agenda. *(No Action) Public comment shall be taken at 5:00 pm or as soon thereafter as possible.*

7. File No. 13025: Complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures. *(approximately 45 minutes) (Discussion and Action)*

8. File No. 13026: Complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony. *(approximately 45 minutes) (Discussion and Action)*

9. File No. 13027: Complaint filed by Ray Hartz, Jr., against Paula Jesson, District City Attorney for allegedly violating §67.21(l), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public. *(attachment)*

   (a) Determination of jurisdiction on complaint filed by Ray Hartz, Jr., against Paula Jesson, Office of the City Attorney for allegedly violating §67.21(l), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public. *(approximately 5 minutes) (Discussion and Action)*

   (b) Hearing on complaint filed by Ray Hartz, Jr., against Paula Jesson, Office of the City Attorney for allegedly violating §67.21(l), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public. *(approximately 45 minutes) (Discussion and Action)*

10. File No. 13028: Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines. *(attachment)*

    (a) Determination of jurisdiction on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines. *(approximately 5 minutes) (Discussion and Action)*

    (b) Hearing on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines. *(approximately 45 minutes) (Discussion and Action)*

11. File No. 13029: Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting. *(attachment)*

    (a) Determination of jurisdiction on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*

    (b) Hearing on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*

12. Approval of Minutes from the March 6, 2013 Regular Meeting. *(approximately 5 minutes) (Action) (attachment)*

13. Approval of Minutes from the April 3, 2013 Regular Meeting. *(approximately 5 minutes) (Action) (attachment)*

14. Approval of Minutes from the May 1, 2013 Regular Meeting. *(approximately 5 minutes) (Action) (attachment)*

15. Approval of Minutes from the June 5, 2013 Regular Meeting. *(approximately 5 minutes) (Action) (attachment)*

16. Approval of Minutes from the July 9, 2013 Special Meeting. *(approximately 5 minutes) (Action) (attachment)*

17. Approval of Minutes from the August 7, 2013 Regular Meeting. *(approximately 5 minutes) (Action) (attachment)*

18. Approval of Minutes from the September 4, 2013 Regular Meeting. *(approximately 5 minutes) (Action) (attachment)*

19. Approval of Minutes from the October 2, 2013 Regular Meeting. *(approximately 5 minutes) (Action) (attachment)*

20. Administrator's Report. *(approximately 5 minutes) (Discussion)*

21. Announcements, Comments, Questions, and Future Agenda Items. *(approximately 10 minutes) (Discussion and Action)*

22. ADJOURNMENT

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SUNSHINE ORDINANCE TASK FORCE
CITY AND COUNTY OF SAN FRANCISCO
DRAFT MINUTES

Hearing Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

May 1, 2013 – 4:00 PM

Regular Meeting

Members: Kitt Grant (Chair), Louise Fischer (Vice-Chair),
Richard Knee, Suzanne Manneh, Allyson Washburn, David Pilpel,
David Sims, Todd David, Chris Hyland, Bruce Oka

1. **CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES**

   The meeting was called to order at 4:10 p.m. Members Washburn was noted absent. There was a quorum. Member Hyland left at 8:58; Chair Grant left at 9:01 p.m.

2. Supervisor of Records Report – Presented by Paula Jesson, Deputy City Attorney.

   Paula Jesson, Deputy City Attorney presented the Supervisor of records report.

   Speakers: Ray Hartz, Jr. expressed that he will submit a complaint against the Supervisor of Records; Peter Warfield recommended Task Force reject the Supervisor of Records Report.

   ***The following information is provided by a speaker, pursuant to Administrative Code Section 67.16. The content is neither generated by, nor subject to approval or verification of accuracy by, the Sunshine Ordinance Task Force.**

   Ray Hartz, Jr. submitted the following additional information for Item (2) as follows:

   Agenda Item (2) public comment (150 words):

*

I just handed to the administrator, a Sunshine Ordinance complaint against DCA Paula Jesson. The alleged violation reads as follows: "For all intents and purposes, DCA Jesson has acted in such a way as to provide legal counsel for City employees having custody of public records for the purposes of denying access to the public." This report from the Supervisor of Records follows the usual pattern: all petitions are denied! If you examine each case, you will see that Ms. Jesson will do nothing but tell you what her office will not, does not, or cannot do. I have to say that my own opinion is that Ms. Jesson is doing exactly what City Attorney Dennis Herrera wants: deny to the public access to records which might embarrass or incriminate City officials and commission members. To this extent, she does her job exceedingly well! I thank her for her report!

3. Public Comment.

   Speakers: William Clark expressed the Charter does not give power to revoke a license with the Arts Commission; Mike Adderio expressed amending the Sunshine Ordinance to require members of Task Force to have training in relation to government and constitution laws; Ray Hatz Jr. expressed Task Force hold-overs and vacancies are the failure of the Rules Committee and Clerk of the Board a complaint has been submitted against the Clerk of the Board; Maioncbi expressed Public Records Act states you can see a document without going through custodian of records; Peter Warfield expressed he was in agreement with the previous speaker and stated similar experience with Library where he was referred to custodian of records.

4. File No. 12058: Complaint filed by Dominic Maioncbi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

   Member Knee, seconded by Member Fischer, moved to find Jurisdiction.

   Speakers: Ray Hartz expressed the meeting has been conducted out of order; Peter Warfield expressed public comment was called out of order.

   The motion PASSED by the following vote:
   Ayes: 8 – Knee, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant
   Absent: 1 – Washburn

   Dominic Maioncbi (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Olive Gong, Custodian of Records, Recreation and Park Department (Respondent), provided an overview of Recreation and Park Department's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the

discussion. Respondent provided a rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Member Knee, seconded by Member Hyland, moved to find Recreation and Park Department in violation of Sunshine Ordinance Section 67.26 for illegal redaction of public records; referral to Compliance and Amendments Committee.

Speakers: Ray Hartz expressed support with motion and reiterated that the requester is not required to state reason for a record request. Peter Warfield expressed Task Force should include the Deputy City Attorney's recommended violations as stated in the memo.

The motion PASSED by the following vote:
Ayes: 7 – Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Noes: 1 – David
Absent: 1 – Washburn

Member Sims, seconded by Member Oka, moved to find Recreation and Park Department in violation of Sunshine Ordinance Section 67.24(e) for illegal redaction of contracts, bids and proposals.

Speaker: Peter Warfield expressed support of the motion.

The motion FAILED by the following vote:
Ayes: 1 –Sims
Noes: 7 – Knee, Pilpel, David, Hyland, Oka, Fischer, Grant
Absent: 1 – Washburn

RECESS
6:04 P.M. – 6:17 P.M.

5. *File No. 13007: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting.

Member Pilpel, seconded by Member Knee, moved to find jurisdiction.

There were no speakers. The motion PASSSED without objection.

Charles Pitts (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Diana Christensen, Director of Investigations, Human Services Agency (Respondent), provided an overview of Human Services Agency's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent waived rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Member Knee, seconded by Member Pilpel, moved to find Human Services Agency in violation of Sunshine Ordinance Section 67.21(c) for Respondent's failure to send a knowledgeable representative to hearing proceedings.

The motion PASSED by the following vote:
Ayes: 8 – Knee, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant
Absent: 1 – Washburn

Member Sims, seconded by Member David, moved to find Humna Services Agency in violation of Sunshine Ordinance Section 67.15(d) for abridging a member of the public and failure to provide necessary tools for public testimony; refer to Education, Outreach and Training.

Speakers: Peter Warfield expressed support of the motions.

The motion PASSED by the following vote:
Ayes: 6 – Pilpel, Sims, David, Hyland, Fischer, Grant
Noes: 2 – Knee, Oka
Absent: 1 – Washburn

6. File No. 13008: Complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15.

Member Knee, seconded by Member David, moved to find jurisdiction.

There were no speakers. The motion PASSSED without objection.

William Clark (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Kate Patterson, Arts Commission (Respondent), provided an overview of Arts Commission's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent provided a rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Member Knee, seconded by Member Oka, moved to find Arts Commission in violation of Sunshine Ordinance 67.7(b) and Brown Act 54954.2(a)(2) for failure to include and adequate description of agenda items and street artist fees.

Speakers: Mike Addario expressed support of the motion.

The motion FAILED by the following vote:
Ayes: 4 – Knee, Sims, Hyland, Oka
Noes: 4 –, Pilpel, David, Fischer, Grant
Absent: 1 – Washburn

7. *File No. 13022: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting.

Member Knee, seconded by Member Fischer, moved to find jurisdiction.

There were no speakers. The motion PASSSED without objection.

Charles Pitts (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Diana Christensen, Director of Investigations, Human Services Agency (Respondent), provided an overview of Human Services Agency's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent waived rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Member Knee, seconded by Member Sims, moved to find Human Services Agency in violation of Sunshine Ordinance Section 67.15(a) for failure in providing and opportunity for members of the public to address the Board; 67.21 for Respondent's failure to send a knowledgeable representative to hearing proceedings; referral to Education Outreach and Training.

Speakers: None.

The motion PASSED by the following vote:
Ayes: 8 – Knee, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant
Absent: 1 – Washburn

8. *File No. 13023: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting.

Member Pilpel, seconded by Member Fischer, moved to find jurisdiction.

There were no speakers. The motion PASSSED without objection.

Charles Pitts (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Diana Christensen, Director of Investigations, Human Services Agency (Respondent), provided an overview of Human Services Agency's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent waived rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Due to a lack of a motion, the Task Force FOUND NO VIOLATION.

Speakers: None.

9. Discussion regarding possible motion on state budget proposals regarding: 1) increasing court record access fees; and 2) halting State reimbursements that assist local governments in complying with the California Public Records Act.

Member Knee presented background on state budget proposal.

Member Knee, seconded by Member Sims, moved to CONTINUE TO THE CALL OF THE CHAIR.

There were no speakers. The motion PASSSED without objection.

10. Discussion regarding proposed Resolution to Mayor Edwin Lee and the Board of Supervisors to: 1) communicate to the Governor and San Francisco's State Legislative representatives their opposition to State budget proposals that would grievously abridge the public's right to know by increasing court record access fees and halting state reimbursements that assist local governments in complying with the California Public Records Act; and 2) to instruct the City's legislative representative in the State Capitol to work diligently to persuade the Governor and the Legislature to delete/defeat said proposals.

Member Knee presented background and reasoning for proposal to Mayor and Board of Supervisors.

Vice Chair Fischer presided over meeting in Chair Granis' absence.

Member Knee, seconded by Member Sims, moved to CONTINUE TO THE CALL OF THE CHAIR.

There were no speakers. The motion PASSSED without objection.

11. Approval of Minutes from the November 7, 2012, Regular Meeting.

Member Pilpel, seconded by Member David, moved to approve the minutes as corrected.

Speaker: None.

The motion PASSED without objection.

12. Approval of Minutes from the December 5, 2012, Regular Meeting.

Member Pilpel, seconded by Member David, moved to approve the minutes as corrected.

Speaker: None.

The motion PASSED without objection.

13. Approval of Minutes from the December 12, 2012, Special Meeting.

Member Pipol, seconded by Member David, moved to approve the minutes as corrected.

Speaker: None.

The motion PASSED without objection.

14. Approval of Minutes from the January 16, 2013 Special Meeting.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

15. Approval of Minutes from the February 6, 2013 Regular Meeting.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

16. Approval of Minutes from the March 6, 2013 Regular Meeting.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

17. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Fischer, seconded by Member David, moved CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

18. Report: Compliance and Amendments Committee meeting of April 16, 2013.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

19. Report: Education, Outreach and Training Committee meeting of April 29, 2013.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

20. Administrator's Report.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

21. Announcements, Comments, Questions, and Future Agenda Items.

Information Technology meeting May 2, 2013, attendance is encouraged; topics of interest; back-up storage and retrieval of City records.

22. ADJOURNMENT

Member Kuee, seconded by Member Olea, moved to ADJOURN.

There were no speakers. The motion PASSED without objection.

There being no further business, the Task Force adjourned at 9:12 p.m.

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Each member of the public will be allotted the same maximum number of minutes to speak as set by the Chair at the beginning of each item, excluding persons requested by the Task Force to make presentations.

Each member of the public who is unable to attend the public meeting or hearing may submit to the City, by the time the hearing begins, written comments regarding the subject of the meeting or hearing;. These comments will be made a part of the official public record.

Hearing Procedures

Complainant presents his/her facts and evidence	5 minutes
Other parties of Complainant present facts and evidence	Up to 3 minutes each
City responds	5 minutes
Other parties of City respond	Up to 3 minutes each
Above total speaking times for Complainant and City to be the same. Matter is with the Task Force for discussion and questions.	
Respondent and Complainant presents clarification/rebuttal	3 minutes
Matter is with the Task Force for motion and deliberation.	
Public comment (Excluding Complainant & City response, witnesses) Vote by Task Force (Public comment at discretion of chair on new motion and/or on new motion if vote fails.)	Up to 3 minutes each

Note: Time must be adhered to. If a speaker is interrupted by questions, the interruption does not count against his/her time.

Disability Access

The hearing rooms in City Hall are wheelchair accessible. Assistive listening devices for the hearing rooms are available upon request with the SOTF Clerk. The nearest accessible BART station is Civic Center (Market/Grove/Hyde Streets). Accessible MUNI Metro lines are the F, J, K, L, M, N, T (exit at Civic Center or Van Ness Stations). MUNI bus lines also serving the area are the 5, 6, 9, 19, 21, 47, 49, 71, and 71L. For more information about MUNI accessible services, call (415) 701-4485. There is accessible parking in the vicinity of City Hall at Civic Center Plaza and adjacent to Davies Hall and the War Memorial Complex. Accessible curbside parking is available on Dr. Carlton B. Goodlett Place and Grove Street.

The following services are available on request 48 hours prior to the meeting; except for Monday meetings, for which the deadline shall be 4:00 p.m. of the last business day of the preceding week: For American sign language interpreters or the use of a reader during a meeting, a sound enhancement system, and/or alternative formats of the agenda and minutes, please contact the SOTF Clerk at (415) 554-7724 to make arrangements for the accommodation. Late requests will be honored, if possible.

In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

Know Your Rights Under the Sunshine Ordinance

Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils, and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

For more information on your rights under the Sunshine Ordinance (Chapter 67 of the San Francisco Administrative Code) or to report a violation of the ordinance, contact: Sunshine Ordinance Task Force, 1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco, CA 94102; phone (415) 554-7724; fax (415) 554-7854; or email sotf@sfgov.org.

Citizens may obtain a free copy of the Sunshine Ordinance by printing Chapter 67 of the San Francisco Administrative Code on the Internet, at http://www.sfbos.org/sunshine.

Cell Phones, Pagers and Similar Sound-Producing Electronic Devices

The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. Please be advised that the Chair may order the removal from the meeting room of any person(s) responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices (Chapter 67A of the San Francisco Administrative Code).

Lobbyist Registration and Reporting Requirements

Individuals and entities that influence or attempt to influence local legislative or administrative action may be required by the San Francisco Lobbyist Ordinance [SF Campaign & Governmental Conduct Code §2.100, et. seq] to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at: 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102; telephone (415) 581-3100; fax (415) 252-3112; web site www.sfgov.org/ethics

**Complainant requested the complaints within Complaint No. 13007 to be heard separately.* *Page 11*

SUNSHINE ORDINANCE TASK FORCE
Compliance and Amendments Committee
CITY AND COUNTY OF SAN FRANCISCO
DRAFT MINUTES

Henring Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

July 16, 2013 – 4:00 P.M.

Regular Meeting

Members: Allyson Washburn (Chair),
Richard Knee, Kitt Grant

1. **CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES**

   The meeting was called to order at 4:10 p.m. There was a quorum.

2. Adoption of June 18, 2013, regular meeting minutes.

   Member Knee, seconded by Member Grant, moved to ADOPT the June 18, 2013 Minutes.

   Speakers: Ray Hartz expressed concern with the vagueness of the minutes.

   The motion PASSED by the following vote:
   Ayes: 3 – Knee, Grant, Washburn

3. **File No. 12058:** Hearing on the status of the Order of Determination of Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

   Dominic Maionchi (Complainant) stated the Respondent provided the same documents provided in original records request, which do not comply with the Order of Determination. Complainant responded to questions raised throughout the discussion. There were no speakers in support of the Complainant. Olive Gong, Recreation and Park (Respondent) stated the California Government Code upholds the Recreation and Park's decision to redact documents provided to the Complainant and not disclose others. Respondent responded to questions raised throughout the discussion. There were no speakers in support of the Respondent. A question and answer period followed. Respondent declined rebuttal. Complainant provided a rebuttal.

Member Knee, seconded by Member Grant, moved to refer the matter back to the Task Force with a recommendation of referral to Ethics Commission for enforcement for violating S.O. Secs. 67.34, 67.26 and 67.21(l); for Chair to draft a letter to the City Attorney stating the Recreation and Park's attorney is in violation of S.O. Sec. 67.21 (l).

Speakers: Ray Hartz expressed support of the motion; Peter Warfield expressed Recreation and Park director should also be held responsible for department's failure to adhere to request.

The motion PASSED by the following vote:
Ayes: 3 – Knee, Grant, Washburn

4. **Public Comment.**

Ray Hartz expressed concern with decisions to have complaints referred to Education, Outreach and Training Committee (EOTC); doubts Chair ability to remain objective and has a history of concluding complaints.

5. **Administrator's Report.**

The Administrator presented the report.

Speakers: None.

6. **Announcements, Comments, Questions, and Future Agenda Items.**

Member Knee announced an event focused on upholding the people's right to know, to take place on July 17, 2013; Knee will not be in attendance for the September Task Force meeting.

7. **ADJOURNMENT**

Member Knee, seconded by Member Grant, moved to ADJOURN.

There were no speakers. **The motion PASSED without objection.**

There being no further business, the Compliance and Amendments Committee adjourned at the hour of 5:48 p.m.

SUNSHINE ORDINANCE TASK FORCE
CITY AND COUNTY OF SAN FRANCISCO
DRAFT - MINUTES

Hearing Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

November 6, 2013 – 4:00 PM

Regular Meeting

Members: Kitt Grant (Chair), Louise Fischer (Vice-Chair), Richard Knee, Allyson Washburn, David Pilpel, David Sims, Todd Devid, Chris Hyland, Bruce Oka

1. **CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES**

The meeting was called to order at 4:10 p.m. Member Pilpel David was noted absent. There was a quorum. Member David was noted present at 4:57 p.m.

Chair Grant announced a request for File No. 12059 (Item 5) be continued to December 4, 2013, by the Complainant and Respondent.

Member Pilpel, seconded by Member Oka, moved to accept the Complainants and Respondents' request for continuance of File No. 12059 to December 4, 2013.

Speakers: None.

The motion PASSED without objection.

2. **Proposed Sunshine Ordinance Task Force Records Retention Schedule:** The Task Force shall prepare, maintain and adopt a records retention and destruction policy as provided in §8.3 of the San Francisco Administrative Code.

Wilson Ng, Records Manager, Office of the Clerk of the Board presented the proposed retention schedule.

Member Pilpel, seconded by Member Hyland, moved to continue the item to December 4, 2013.

Speakers: Patrick Monette-Shaw questioned means of record content; Ray Hartz expressed the index of Records is import tool in researching records; Peter Warfield

expressed concern with destruction of records and ADA compliancy of records; Jason Grant Garza expressed concern as to what defines a record.

The motion **PASSED** by the following vote:
Ayes: 8 – Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Absent: 1 – David

3. Pending Complaints and 45-Day Hearing Rule - Scheduling of Complaints.

Chair Grant presented a comparison of agendized complaints; the efficiency of complaints heard and Order of Determination made by current Task Force. The Task Force would have to meet twice a month to reach compliancy with the 45-Day Hearing Rule.

The Administrator will work with Building Management to secure additional dates for special meetings.

Speakers: Patrick Monette-Shaw expressed agreement with the Task Force meeting an additional day a month; Ray Hartz expressed concern with the Task Force adhering with 45-day rule; Peter Warfield expressed concern with back-log of complaints and agreed with the Task Force meeting twice a month; Allen Grossman read a section of Ordinance regarding 3 minute public testimony rule; Jason Grant Garza expressed concern with a IDR he allegedly submitted and request for a hearing with before the Task Force.

4. File No. 12058: The Compliance and Amendments Committee has referred File No. 12058, Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

Dominic Maionchi (Complainant) provided an overview of the complaint. The Complainant further requested the Task Force to find violations. Patrick Monette-Shaw and Ray Hartz, Jr., spoke in support of the Complainant. Olive Gong (Respondent) provided an overview of Recreation and Park's defense; reiterating the department is not in violation according to their interpretation and the department policy to not disclose addresses. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Knee, seconded by Member Oka, moved to find the Recreation and Park Department in violation of the Sunshine Ordinance as determined in the Order of Determination (§§ 67.21(c), 67.24(g) and 67.34); referral to the Ethics Commission for enforcement specifically naming Phil Ginsburg, Director, Recreation and Park Department responsible.

Speakers: Male Speaker expressed support for Complainant; Peter Warfield expressed support of Complainant.

The motion **PASSED** by the following vote:
Ayes: 8 – Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Absent: 1 – David

RECESS 6:40 PM – 6:57 PM

5. File No. 12059: The Compliance and Amendments Committee has referred File No. 12059, Supreet Pabla, SEIU Local 1021 against Human Services Agency for allegedly failing to provide records requested relevant to the representation of the bargaining unit's employees.

Continuance requested by Complainant and Respondent. Motion Passed (Item 1).

Member Pilpel, seconded by Member Oka, moved to accept the Complainants and Respondents' request for continuance of File No. 12059 to December 4, 2013.

6. Public Comment.

Speakers: Ray Hartz expressed the 3 minute public testimony rule is not at the discretion of the body, but of the public; Patrick Monette-Shaw expressed utilizing the Superior Court when faced City actions against the public; Paula Datesh expressed concern with a permit revocation by the Arts Commission; James Chaffee presented a presentation regarding the Library Commission; Allen Grossman expressed concern with vacancies on the Task Force and pending referrals; Peter Warfield addressed the Superior Court ruling against the Ethic Commission; Jason Grant Garza expressed concern regarding an hearing request he allegedly submitted.

7. File No. 13025: Complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures.

Member Knee, seconded by Member Pilpel, moved to find jurisdiction.

Speakers: None.

The motion **PASSED** without objection.

William Clark (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. Robert Clark and Paula Datesh spoke in support of the Complainant. Howard Lazar (Respondent) provided an overview of the Arts Commission's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Pilpel, seconded by Member Washburn, moved to find the Arts Commission in violation of Sunshine Ordinance §67.21(a).

Speakers: Ray Hartz expressed concern of departments mischaracterizing the advice of their City Attorneys.

The motion FAILED by the following vote:
Ayes: 4 – Washburn, Pilpel, Hyland, Oka
Noes: 5 – Knee, David, Sims, Fischer, Grant

MATTER CONCLUDED.

8. File No. 13026: Complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony.

Member Fischer, seconded by Member Hyland, moved to find jurisdiction.

Speakers: None.

The motion PASSED without objection.

Ray Hartz, Jr., (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Rick Caldeira, Deputy Director, Office of the Clerk of the Board (Respondent) provided an overview of the Clerk of the Board's defense; consideration is taken to not misrepresent speakers; speakers have the option to submit a 150-word summary. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Speakers: Male Speaker expressed the minutes should summarize the speaker's comments for archival purposes; Peter Warfield expressed support of the complainant.

Due to a lack of a motion, the Task Force FOUND NO VIOLATION.

Member Knee, seconded by Member Hyland, moved to find a violation of Sunshine Ordinance §67.16 for failing to provide a summary each speakers' statement with clarity and precision.

Speakers: Peter Warfield expressed the public has no power therefore minutes should be summarized; Male Speaker expressed he speaks on various issues during his public comment.

The motion FAILED by the following vote:
Ayes: 4 – Knee, Washburn, Hyland, Oka
Noes: 5 – Pilpel, Knee, Sims, David, Fischer, Grant

MATTER CONCLUDED.

9. File No. 13027: Complaint filed by Ray Hartz, Jr., against Paula Jesson, District City Attorney for allegedly violating §67.21(j), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public.

Member Knee, seconded by Member Washburn, moved to find jurisdiction.

Speakers: Peter Warfield expressed support of finding jurisdiction.

The motion PASSED by the following vote:
Ayes: 8 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer, Grant
Noes: 1 – Pilpel

Ray Hartz, Jr., (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Not Present (Respondent) to provide an overview of District Attorney's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Complainant further requested the Task Force to find violations.

Member Knee, seconded by Member David, moved to find Paula Jesson, District City Attorney in violation of Sunshine Ordinance §67.21(d), for failure to immediately order the release of records requested; §67.21(e), for failure of a representative to appear before the Task Force; referral to the Compliance and Amendments Committee.

The motion PASSED by the following vote:
Ayes: 8 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer, Grant
Noes: 1 – Pilpel

10. File No. 13028: Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines.

Member Knee, seconded by Member Hyland, moved to find jurisdiction.

Lisa Blakely, Director of Support Services challenged jurisdiction due to pending mediation with the Community Housing Partnership and Health Services Agency; Charles Pitts expressed the complaint is within the Task Force's jurisdiction.

Speakers: None.

The motion PASSED by the following vote:
Ayes: 9 – Knee, Washburn, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant

Charles Pitts (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Lisa Blakely, Director of Support Services

(Respondent) provided an overview of the Community Housing Partnership's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent provided a rebuttal and requested the Task Force concluded the matter. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Due to a lack of a motion, the Task Force FOUND NO VIOLATION.

Speakers: None.

MATTER CONCLUDED

11. File No. 13029: Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting.

Member Knee, seconded by Member Hyland, moved to find jurisdiction.

Lisa Blakely, Director of Support Services challenged jurisdiction due to the fact of tenant meetings not being equivalent to its Board meetings; Charles Pitts expressed the complaint is within the Task Force's jurisdiction.

Speakers: None.

The motion PASSED without objection.

Charles Pitts (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Lisa Blakely, Director of Support Services (Respondent) provided an overview of the Community Housing Partnership's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent provided a rebuttal and requested the Task Force concluded the matter. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Due to a lack of a motion, the Task Force FOUND NO VIOLATION.

Speakers: None.

MATTER CONCLUDED

12. Approval of Minutes from the March 6, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

13. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

14. Approval of Minutes from the May 1, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

15. Approval of Minutes from the June 5, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

16. Approval of Minutes from the July 9, 2013 Special Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

17. Approval of Minutes from the August 7, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

18. Approval of Minutes from the September 4, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speakers: None.

The motion PASSED without objection.

19. Approval of Minutes from the October 2, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

20. Administrator's Report.

Report was given by Andrea Ausberry, Sunshine Ordinance Task Force Administrator.

21. Announcements, Comments, Questions, and Future Agenda Items

Andrea Ausberry, Sunshine Ordinance Task Force Administrator, announced her resignation as Task Force Administrator. Ms. Ausberry will transition into the legislative branch of the City and County of San Francisco; Member Pilpel announced the Ethics Commission will be amending its resolution and Education, Outreach and Training will be rescheduled.

22. ADJOURNMENT

Member Knee, seconded by Member Sims, moved to ADJOURN.

There were no speakers. The motion PASSED without objection.

There being no further business, the Task Force adjourned at the hour of 10:00 p.m.

90 foot slip- red.pdf

From: Gong, Olive
Sent: Monday, December 03, 2012 5:09 PM
To: 'dominic.malonch'
Cc: McArthur, Margaret
Subject: Response to your request re 90 foot slip

Hello Dominic,

Hope you had a good weekend?

In response to your request dated 11-22-2012, please find attached the names and information for the people on the 90' Wait List. We do not actually have contracts as was requested.

Please note that we have redacted the personal contact information in these documents in order to protect the individuals' right to privacy under California Constitution, Article I, section 1, and California Government Code Sections 6254(c) and 6254(k). These provisions guard against disclosure of information that would invade personal privacy. Further, both the California Public Records Act (California Government Code Section 6250) and the San Francisco Sunshine Ordinance (San Francisco Administrative Code Section 67.1(g)) acknowledge the importance of protecting personal privacy where disclosing records in response to a public records request.

Best regards,
Olive

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

From: dm567@pacbell.net [mailto:dm567@pacbell.net]
Sent: Thursday, November 22, 2012 5:18 PM
To: Moren, John
Cc: Doug
Subject: Re: 90 foot slip

John,

Are you never embarrassed?

I am requesting copies of the contracts for all people on the 90 foot wait list.

dom

Edwin M. Lee, Mayor
Philip A. Ginsburg, Executive Director

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

NANCY MUELLER
[redacted]

NANCY S. MUELLER
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted] O.K.
Other: 0

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that my incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X

LUCA BORGATTI FOR NANCY-S MUELLER
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00
CK# 1013
11/9/11

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Neff Pinrus
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 510-564-4055

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and guest standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be canceled.

Renewal: X

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

11 NOV 22 AM 8:25

S.F. MARINA

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Peter Sitchu
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 916-275-2721

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and guest standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be canceled.

Renewal: X

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00 CHECK OUT 10/5/11

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL 415.831.6322 FAX: 415.292.2015 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): JASON (Last) Holloway

MAILING ADDRESS: [redacted] (APT NO.) ____

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME [redacted] WORK): (___) ____

CURRENT BOAT INFORMATION:

POWER: ___ SAIL: ___ LOA (Tip-to-Tip) ____ DRAFT: ____

NO BOAT BUT PLAN TO GET: POWER: ___ SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' __ 90' ✓

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: ___

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

#75.00 CK#1115 04/27/12

Mayor Gavin Newsom
General Manager Phillip A. Ginsburg

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL 415.831.6322 FAX: 415.292.2015 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): Paul (Last) Reyff

MAILING ADDRESS: [redacted] (APT NO.) ____

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME [redacted] WORK): (415) 860-8955

CURRENT BOAT INFORMATION

POWER: X SAIL: ___ LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER: ___ SAIL: ___

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' __ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application X

Renewal ___

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

#75.00 CK#1125 3/7/12

Mayor Gavin Newsom
General Manager Phillip A. Ginsburg

Gong, Olive

From: SOTF
Sent: Thursday, September 26, 2013 3:06 PM
To: Gong, Olive
Cc: 'Kitt (sunshinechelgrant@gmail.com) Grant'; Threet, Jerry; Lee, Celia; Ginsburg, Phil; Ballard, Sarah; 'dm567@pacbell.net'
Subject: FW: Response to COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
Attachments: Malonchi vs RPD Case 12058 response for Aug 7, 2013 Hearing and Sept 4, 2013.pdf; Attachment- Letter to SOTF dated Dec 19, 2012 - Response to Complaint 12058 - Dominic Malonchi v Rec and Park Dept.pdf

Ms. Gong,

The SOTF is in receipt of the attached documents which are the same documents/response submitted previously.

As a reminder the SOTF requested the presence of Mr. Ginsburg and Ms. Ballard to attend the October 2, 2013 hearing.

Best regards,

Andrea Ausberry
Sunshine Ordinance Task Force

From: Gong, Olive
Sent: Wednesday, September 25, 2013 3:40 PM
To: SOTF
Subject: Response to COMPLAINT No. 12058, Dominic Malonchi v Recreation and Park

Good Afternoon Andrea,

I have attached RPD's response for the October 2, 2013 hearing. The response is the same as what had previously been sent for the last hearing, Sept 4, 2013 and the hearing before that, August 7, 2013.

Thank you for your help,
Olive

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfrecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle
From: SOTF
Sent: Monday, September 23, 2013 4:22 PM
To: 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Ballard, Sarah; supreet.pabla@seiu1021.org; Christensen, Diana; Cantara, Gary; Nguyen, Francis; Chu, Carmen; 'mike@gtsf.org'; 'Ray Hartz Jr'; Herrera, Luis; Blackman, Sue; 'Pmonette-shaw@earthlink.net'; missforties@hotmail.com; Morewitz, Mark; supermica@gmail.com; Fu, Ben; Lewis, Don (CPC); Hwang, Lulu
Cc: 'Kitt (sunshinechelgrant@gmail.com) Grant'; Lee, Celia; Threet, Jerry
Subject: SOTF - NOTICE OF HEARING: Task Force Meeting October 2, 2013

Good Afternoon,

You are receiving this notice, because you are named as a Complainant or Respondent in one of the following complaints scheduled with the Sunshine Ordinance Task Force, 1)to hear the merits of the complaint 2) issue a determination and/or 3)complaint has been referred from a Task Force Committee.

1. COMPLAINT No. 12058, Dominic Malonchi v Recreation and Park
2. COMPLAINT No. 12059, Supreet Pabla, SEIU Local 1022 v Human Services Agency
3. COMPLAINT No. 13012, Fondanova, representing Glad Tidings Church v the Office of the Assessor-Recorder
4. COMPLAINT No. 13013, Ray Hartz, Jr. v Luis Herrera, City Librarian
5. COMPLAINT No. 13021, Patrick Monette-Shaw/ Dr. Maria Rivera v the Public Health Commission
6. COMPLAINT No. 13024, Mica Ringel v the Planning Department

Date: October 2, 2013

Location: City Hall, Room 408

Time: 4:00 p.m.

Complainants: Your attendance is required for this meeting/hearing.

Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

Documentation (evidence supporting/disputing complaint)

For a document to be considered, it must be received at least five (5) working days before the hearing (see attached Public Complaint Procedure).

For inclusion of the agenda packet, supplemental/supporting documents must be received by 12:00 pm, September

27, 2013.

Kind regards,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415.554.7724 |Fax 415.554.5163
sotf@sfgov.org |www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
Follow Us!| Twitter

Complete a Board of Supervisors Customer Service Satisfaction form by clicking HERE.

Gong, Olive

From: SOTF
Sent: Thursday, October 24, 2013 4:57 PM
To: 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Bellard, Sarah; supreet.pabla@seiu1021.org; Christensen, Diana; Cantara, Gary; 'billandbobclark@access4less.net'; Lazer, Howard; Patterson, Kate; Rey Hartz Jr; Calvillo, Angela; Caldeira, Rick; Nevin, Peggy; Song, Jack; Jesson, Paula; 'Elizabeth Hewson' **Cc:** kitt grant; Lee, Celia; Threet, Jerry
Subject: SOTF - NOTICE OF HEARING: Task Force Meeting November 6, 2013
Attachments: 1_Complaint Procedures_4-28-09 _Final.pdf

Good Afternoon,

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5. COMPLAINT No. 13027, Ray Hartz, Jr. v Paula Jessan, Office of the City Attorney
6. COMPLAINT No. 13028, Charles Pitts v Community Housing Partnership
7. COMPLAINT No. 13029, Charles Pitts v Community Housing Partnership

Date: November 6, 2013

Location: City Hall, Room 408

Time: 4:00 p.m.

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Thank you,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
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sotf@sfgov.org | www.sfbos.org
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San Francisco, CA 94102
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SUNSHINE ORDINANCE TASK FORCE
CITY AND COUNTY OF SAN FRANCISCO
DRAFT - MINUTES

Hearing Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

October 2, 2013 – 4:00 PM

Regular Meeting

1. Call to Order, Roll Call, and Agenda Changes.

   The meeting was called to order at 4:10 p.m. Chair Grant and Members Pilpel and Hyland were noted absent. There was a quorum. Member Hyland was noted present at 4:55 p.m. Member Sims was noted absent at 7:57 p.m.

   Vice Chair Fischer presided over the meeting.

   Vice Chair Fischer announced a request for File No. 12059 (Item 4) be continued to November 5, 2013, by the Complainant and Respondent.

   The Complainant of File No. 12058 (Item 2) requested a continuance of his hearing due to the affect of member absences on the determination of the complaint.

   Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

   Speakers: Allen Gross expressed opposition with the members' absences; Peter Warfield requested additional information on the reason for the continuance of complaint No. 12059; Patrick Monette-Shaw requested the members uphold absences as stated in Sunshine Ordinance Task Force bylaws; Dominic Maloncbi expressed reasoning of his request for continuance of Complaint No. 12058; Ray Hartz expressed six members being present would not make a fair determination on today's complaints.

   The motion PASSED by the following vote:
   Ayes: 5 –Washburn, Sims, David, Oka, Fischer
   Noes: 1 – Knee
   Absent: 3 – Pilpel, Hyland, Grant

2. File No. 12058: The Compliance and Amendments Committee has referred File No. 12058, Dominic Maloncbi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

   Continuance requested by Complainant. Motion Passed (Item 1).

   Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

   RECESS
   4:50 p.m. - 5:00 p.m.

3. Public Comment:

   Allen Grossman announced the Ethics Commission's new draft of regulations; Ray Hartz expressed concern with the Education, Outreach and Training Committee Chair not drafting a letter to the Clerk of the Board as determined by the committee; Peter Warfield expressed the importance of open government; Male Speaker presented misconduct of Library Commission; Patrick Monette-Shaw expressed the Ethics Commission attempt to exempt themselves from hearing complaints referred for enforcement; Female Speaker expressed the treatment of the public by City agencies who request public records.

   ***The following information is provided by a speaker, pursuant to Administrative Code Section 67.16. The content is neither generated by, nor subject to approval or verification of accuracy by, the Sunshine Ordinance Task Force.**

   Derek Kerr, MD submitted the following additional information for Public Comment as follows:

   Agenda Item (3) Public Comment (150 words):
   Derek Kerr's 150 Word Summary for inclusion in body of SOTF – OCTOBER 2, 2013 Meeting Minutes

   *Burying my Commendation under the misleading agenda item "LHH Update" follows a pattern of deception. For example, Laguna Honda CEO Mivic Hirose was required to read this Commendation before the hospital's 40-member Leadership Forum. Instead, she read it to 11 members of her Executive Committee. After we complained, Hirose complied. Also, DPH Director Barbara Garcia had to retract a DPH Press Release that had labeled us "detractors" who made "false statements" about misappropriated patient funds. The first retraction was unsigned. We complained. Garcia signed the second version, but it was a Memo - not a Press Release. We complained again, and she complied. Lucky for us, we could appeal these Settlement violations to the Court. Now, we appeal to you because the Sunshine Ordinance was violated. This habitual misconduct will persist unless you monitor the Health Department and Commission for compliance.

4. **File No. 12059:** The Compliance and Amendments Committee has referred File No. 12059, Supreet Pabla, SEIU Local 1021 against Human Services Agency for allegedly failing to provide records requested relevant to the representation of the bargaining unit's employees.

Continuance requested by Complainant and Respondent. Motion Passed (Item 1).

Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

5. **File No. 13013:** The Compliance and Amendments Committee has referred File No. 13013, of Ray Hartz Jr., against Luis Herrera, City Librarian for allegedly abridging public comment by allowing selective accessibility of library audio visual equipment.

Ray Hartz Jr., (Complainant) provided an overview of the complaint; the Library Commission continues to deny access to its equipment to present documents and /or PowerPoint presentations during its meetings as it allows for guests of the commission. The Complainant further requested the Task Force to find violations. There were no speakers in support of the Complainant. Sue Blackman (Respondent), provided an overview of the Ethics Commission defense; the Library Commission is a policy body that has the right to not allow the public to use its audio visual equipment and the commission is in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian, in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Ethics Commission for enforcement.

Speakers: Patrick Monette-Shaw expressed support of the referral; Male Speaker presented PowerPoint on visual impact of audio visual presentations when allowed access to equipment; Peter Warfield expressed support of the motion.

The motion PASSED by the following vote:
Ayes: 7– Knee, Washburn, Sims, David, Hyland, Oka, Fischer
Absent: 2 – Pilpel, Grant

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Board of Supervisors for enforcement.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, Sims, Hyland, Oka, Fischer
Noes: 1 – David
Absent: 2 – Pilpel, Grant

6. **File No. 13012:** Complaint filed by Michael Fondanova, representing Glad Tidings Church against the Office of the Assessor-Recorder for allegedly failing to provide complete records associated with Glad Tidings Church and San Francisco Teen Challenge.

Item continued from September 4, 2013 meeting. Jurisdiction determined.

Michael Fondanova (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers in support of the Complainant. Margaret Sing, Assessor - Recorder's Office, (Respondent), provided an overview of the Office of the Assessor-Recorder's defense; all non-exempt documents have been handed over to the Complainant. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Due to a lack of a motion, the Task Force **FOUND NO VIOLATION.**

7. **File No. 13021:** Complaint filed by Patrick Monette-Shaw and Maria Rivero, MD against the Public Health Commission for allegedly violating Sunshine Ordinance §§ 67.7(a), 67.7(b), and 67.9(a); failing to notice members of the public, and noticing a deficient agenda.

Member Knee, seconded by Member David, moved to find jurisdiction.

Speakers: None.

The motion PASSED by the following vote:
Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer
Absent: 2 – Pilpel, Grant

Patrick-Monette-Shaw and Maria River, MD (Complainants) provided an overview of the complaint; the intension of the Public Health Commission was to not provide a meaningful description of the item as an accommodation regarding Dr. Kerr and listed the item generically "Laguna Honda Update". The Complainants requested the Task Force to find violations. Dr. Kerr presented facts and evidence in support of the Complainants. Mark Morewitz, Executive Secretary, Public Health Commission (Respondent), provided an overview of the Public Health Commission's defense; the item was written by the advice of their City Attorney. The Commission has since taken steps to ensure future items are written in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Speakers: None.

Member Washburn, seconded by Member Oka, moved to find the Public Health Commission in violation of §§ 67.7(a), 67.7(b) and 67.9(a); referral to the Compliance and Amendments Committee to provide guidance on constructing agendas.

The motion PASSED by the following vote:
Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer
Absent: 2 – Pilpel, Grant

RECESS
6:55 p.m. – 7:00 p.m.

8. File No. 13024: Complaint filed by Mica Ringel against the Planning Department for allegedly failing to provide requested records associated with the proposed development of 480 Potrero Avenue.

Member Knee, seconded by Member Sims, moved to find jurisdiction.

Speakers: None.

The motion PASSED without objection.

Mica Ringel (Complainant) provided an overview of the complaint; requested to view complete case file, through research and requests the Complainant noticed missing files not included in the original request for records. The Complaintant requested the Task Force to find violations. There were no speakers in support of the Complainant. Lulu Hwang, Custodian of Records, Planning Department (Respondent), provided an overview of the Planning Department's defense; missing documents were retrieved and handed over to the Complainant on a disk. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.26 and 67.27.

Speakers: None.

The motion FAILED by the following vote:
Ayes: 4 –Washburn, Hyland, Oka, Fischer
Noes: 2 – Knee, David
Absent: 3 – Pilpel, Sims, Grant

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.21(a) and 67.29-7; referral to Compliance and Amendments Committee.

Speakers: None.

The motion PASSED by the following vote:
Ayes: 6 – Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

9. Approval of Minutes from the March 6, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

10. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

11. Approval of Minutes from the May 1, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

12. Approval of Minutes from the June 5, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

13. Approval of Minutes from the July 9, 2013 Special Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

14. Approval of Minutes from the August 7, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

15. Approval of Minutes from the September 4, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

16. Report: Compliance and Amendments Committee meeting of September 17, 2013.

Member Washburn (Chair) provided a summary of the Compliance and Amendments Committee meeting of September 17, 2013.

Spenkers: None.

17. Report: Education, Outreach and Training Committee meeting of September 16, 2013.

Member David (Vice-Chair) provided a summary of the Education, Outreach and Training Committee meeting of September 17, 2013.

18. Administrator's Report.

Report was given by Andrea Ausberry, Sunshine Ordinance Task Force Administrator.

19. Announcements, Comments, Questions, and Future Agenda Items.

Member Knee announced, applications have been submitted for Seats 2 and 4 of the Task Force.

20. ADJOURNMENT

Member Knee, seconded by Member David, moved to ADJOURN.

There were no speakers. The motion PASSED without objection.

There being no further business, the Task Force adjourned at the hour of 8:31 p.m.

File No. 12058 SOTF Item No. 4
CAC Item No.

SUNSHINE ORDINANCE TASK FORCE
AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force (SOTF) Date: May 1, 2013

Compliance and Amendments Committee (CAC) Date:

CAC/SOTF

- [ ] [ ] Memorandum
- [ ] [ ] Order of Determination
- [x] [x] Complaint and Supporting documents
- [x] [x] Respondent's Response
- [ ] [ ] Minutes

OTHER

Completed by: Andrea Ausberry Date April 24, 2013
Completed by: Date

*An asterisked item represents the cover sheet to a document that exceeds 75 pages. The complete document is in the file.

Gong, Olive

From: SOTF
Sent: Thursday, September 26, 2013 3:06 PM
To: Gong, Olive
Cc: 'Kitt (sunshinechairgrant@gmail.com) Grant'; Threet, Jerry; Lee, Cella; Ginsburg, Phil; Ballard, Sarah; 'dm587@pacbell.net'
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Best regards,

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Sunshine Ordinance Task Force

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Thank you for your help,
Olive

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

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Cc: 'Kitt (sunshinechairgrant@gmail.com) Grant'; Lee, Celia; Threet, Jerry
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Cc:
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Thank you,

1

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415-554-7724 | Fax 415-554-5163
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SUNSHINE ORDINANCE TASK FORCE
CITY AND COUNTY OF SAN FRANCISCO
DRAFT - MINUTES

Hearing Room 408
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

October 2, 2013 – 4:00 PM

Regular Meeting

1. Call to Order, Roll Call, and Agenda Changes.

The meeting was called to order at 4:10 p.m. Chair Grant and Members Pilpel and Hyland were noted absent. There was a quorum. Member Hyland was noted present at 4:25 p.m. Member Sims was noted absent at 7:57 p.m.

Vice Chair Fischer presided over the meeting.

Vice Chair Fischer announced a request for File No. 12059 (Item 4) be continued to November 5, 2013, by the Complainant and Respondent.

The Complainant of File No. 12058 (Item 2) requested a continuance of his hearing due to the affect of member absences on the determination of the complaint.

Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

Speakers: Allen Gross expressed opposition with the members' absences; Peter Warfield requested additional information on the reason for the continuance of complaint No. 12059; Patrick Monette-Shaw requested the members uphold absences as stated in Sunshine Ordinance Task Force bylaws; Dominic Malonchi expressed reasoning of his request for continuance of Complaint No. 12058; Ray Hartz expressed six members being present would not make a fair determination on today's complaints.

The motion PASSED by the following vote:
Ayes: 5 – Washburn, Sims, David, Olea, Fischer
Noes: 1 – Knee
Absent: 3 – Pilpel, Hyland, Grant

2. **File No. 12058:** The Compliance and Amendments Committee has referred File No. 12058, Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

Continuance requested by Complainant. Motion Passed (Item 1).

Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

RECESS
4:50 p.m. - 5:00 p.m.

3. Public Comment:

Allen Grossman announced the Ethics Commission's new draft of regulations; Ray Hartz expressed concern with the Education, Outreach and Training Committee Chair not drafting a letter to the Clerk of the Board as determined by the committee; Peter Warfield expressed the importance of open government; Male Speaker presented misconduct of Library Commission; Patrick Monette-Shaw expressed the Ethics Commission attempt to exempt themselves from hearing complaints referred for enforcement; Female Speaker expressed the treatment of the public by City agencies who request public records.

*The following information is provided by a speaker, pursuant to Administrative Code Section 67.16. The content is neither generated by, nor subject to approval or verification of accuracy by, the Sunshine Ordinance Task Force.

Derek Kerr, MD submitted the following additional information for Public Comment as follows:

Agenda Item (3) Public Comment (150 words):
Derek Kerr's 150 Word Summary for Inclusion in body of SOTF – OCTOBER 2, 2013 Meeting Minutes

*Burying my Commendation under the misleading agenda item "LHH Update" follows a pattern of deception. For example, Laguna Honda CEO Mivic Hirose was required to read this Commendation before the hospital's 40-member Leadership Forum. Instead, she read it to 11 members of her Executive Committee. After we complained, Hirose complied. Also, DPH Director Barbara Garcia had to retract a DPH Press Release that had labeled us "detractors" who made "false statements" about misappropriated patient funds. The first retraction was unsigned. We complained. Garcia signed the second version, but it was a Memo - not a Press Release. We complained again, and she complied. Lucky for us, we could appeal these Settlement violations to the Court. Now, we appeal to you because the Sunshine Ordinance was violated. This habitual misconduct will persist unless you monitor the Health Department and Commission for compliance.

4. **File No. 12059:** The Compliance and Amendments Committee has referred File No. 12059, Supreet Pabla, SEIU Local 1021 against Human Services Agency for allegedly failing to provide records requested relevant to the representation of the bargaining unit's employees.

Continuance requested by Complainant and Respondent. Motion Passed (Item 1).

Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

5. File No. 13013: The Compliance and Amendments Committee has referred File No. 13013, of Ray Hartz Jr., against Luis Herrera, City Librarian for allegedly abridging public comment by allowing selective accessibility of library audio visual equipment.

Ray Hartz Jr., (Complainant) provided an overview of the complaint; the Library Commission continues to deny access to its equipment to present documents and /or PowerPoint presentations during its meetings as it allows for guests of the commission. The Complainant further requested the Task Force to find violations. There were no speakers in support of the Complainant. Sue Blackman (Respondent), provided an overview of the Ethics Commission defense; the Library Commission is a policy body that has the right to not allow the public to use its audio visual equipment and the commission is in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian, in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Ethics Commission for enforcement.

Speakers: Patrick Monette-Shaw expressed support of the referral; Male Speaker presented PowerPoint on visual impact of audio visual presentations when allowed access to equipment; Peter Warfield expressed support of the motion.

The motion PASSED by the following vote:
Ayes: 7– Knee, Washburn, Sims, David, Hyland, Oka, Fischer
Absent: 2 – Pilpel, Grant

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Board of Supervisors for enforcement.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, Sims, Hyland, Oka, Fischer
Nocs: 1 – David
Absent: 2 – Pilpel, Grant

6. File No. 13012: Complaint filed by Michael Fondanova, representing Glad Tidings Church against the Office of the Assessor-Recorder for allegedly failing to provide complete records associated with Glad Tidings Church and San Francisco Teen Challenge.

Item continued from September 4, 2013 meeting. Jurisdiction determined.

Michael Fondanova (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers in support of the Complainant. Margaret Sing, Assessor - Recorder's Office, (Respondent), provided an overview of the Office of the Assessor-Recorder's defense; all non-exempt documents have been handed over to the Complainant. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Due to a lack of a motion, the Task Force FOUND NO VIOLATION.

7. File No. 13021: Complaint filed by Patrick Monette-Shaw and Maria Rivero, MD against the Public Health Commission for allegedly violating Sunshine Ordinance §§ 67.7(a), 67.7(b), and 67.9(a); failing to notice members of the public, and noticing a deficient agenda.

Member Knee, seconded by Member David, moved to find jurisdiction.

Speakers: None.

The motion PASSED by the following vote:
Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer
Absent: 2 – Pilpel, Grant

Patrick-Monette-Shaw and Maria River, MD (Complainants) provided an overview of the complaint; the intension of the Public Health Commission was to not provide a meaningful description of the item as an accommodation regarding Dr. Kerr and listed the item generically "Laguna Honda Update". The Complainants requested the Task Force to find violations. Dr. Kerr presented facts and evidence in support of the Complainants. Mark Morewitz, Executive Secretary, Public Health Commission (Respondent), provided an overview of the Public Health Commission's defense; the item was written by the advice of their City Attorney. The Commission has since taken steps to ensure future items are written in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Speakers: None.

Member Washburn, seconded by Member Oka, moved to find the Public Health Commission in violation of §§ 67.7(a), 67.7(b) and 67.9(a); referral to the Compliance and Amendments Committee to provide guidance on constructing agendas.

The motion PASSED by the following vote:
Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer
Absent: 2 – Pilpel, Grant

RECESS
6:55 p.m. – 7:00 p.m.

8. File No. 13024: Complaint filed by Mica Ringel against the Planning Department for allegedly failing to provide requested records associated with the proposed development of 480 Potrero Avenue.

Member Knee, seconded by Member Sims, moved to find jurisdiction.

Speakers: None.

The motion PASSED without objection.

Mica Ringel (Complainant) provided an overview of the complaint; requested to view complete case file, through research and requests the Complainant noticed missing files not included in the original request for records. The Complaintant requested the Task Force to find violations. There were no speakers in support of the Complainant. Lulu Hwang, Custodian of Records, Planning Department (Respondent), provided an overview of the Planning Department's defense; missing documents were retrieved and handed over to the Complainant on a disk. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.26 and 67.27.

Speakers: None.

The motion FAILED by the following vote:
Ayes: 4 – Washburn, Hyland, Oka, Fischer
Noes: 2 – Knee, David
Absent: 3 – Pilpel, Sims, Grant

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.21(a) and 67.29-7; referral to Compliance and Amendments Committee.

Speakers: None.

The motion PASSED by the following vote:
Ayes: 6 – Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

9. Approval of Minutes from the March 6, 2013 Regular Meeting.

Member Washburn, seconded by Member Hylaud, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Spenker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

10. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

11. Approval of Minutes from the May 1, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

12. Approval of Minutes from the June 5, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Spenker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

13. Approval of Minutes from the July 9, 2013 Special Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

14. Approval of Minutes from the August 7, 2013 Regular Meeting.

Member Washburn, seconded by Member Hylnnd, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

15. Approval of Minutes from the September 4, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:
Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer
Absent: 3 – Pilpel, Sims, Grant

16. Report: Compliance and Amendments Committee meeting of September 17, 2013.

Member Washburn (Chair) provided a summary of the Compliance and Amendments Committee meeting of September 17, 2013.

Speakers: None.

17. Report: Education, Outreach and Training Committee meeting of September 16, 2013.

Member David (Vice-Chair) provided a summary of the Education, Outreach and Training Committee meeting of September 17, 2013.

18. Administrator's Report.

Report was given by Andrea Ausberry, Sunshine Ordinance Task Force Administrator.

19. Announcements, Comments, Questions, and Future Agenda Items.

Member Knee announced, applications have been submitted for Seats 2 and 4 of the Task Force.

20. ADJOURNMENT

Member Knee, seconded by Member David, moved to ADJOURN.

There were no speakers. The motion PASSED without objection.

There being no further business, the Task Force adjourned at the hour of 8:31 p.m.

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

JERRY THREET
Deputy City Attorney

Direct Dial: (415) 554-3914
Email: jerry.threet@sfgov.org

MEMORANDUM

TO: Sunshine Ordinance Task Force

FROM: Jerry Threet
Deputy City Attorney

DATE: April 26, 2013

RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

BACKGROUND

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2013 records request, and that they also failed to provide unredacted copies of the records requested.

COMPLAINT

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

JURISDICTION

The Recreation and Parks Department is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Department.

APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request.
- Section 67.24 governs public information that must be disclosed under the Ordinance, notwithstanding exceptions under the Public Records Act.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.

APPLICABLE CASE LAW:

None.

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Complainant alleges as follows:

> November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v.

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RECEPTION: (415) 554-3800 · FACSIMILE: (415) 437-4644

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RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

In a letter dated December 19, 2011, Olive Gong responded on behalf of the Department to complaint. Gong first alleges that the records request was received by email after 5 p.m. on Thursday, November 22, 2012, which was a holiday and thus the Department was not open for business. Ms Gong thus alleges that the Department actually received the request on Monday, November 26, 2012. She thus concludes that the Department's email response on December 2, 2012, 7 days later, was within the 10 day response time required by the Ordinance. Ms. Gong further alleges that the response included electronic copies of the five application forms for 90 foot berths that were responsive and in the Department's custody.

Ms. Gong further alleges that the Department redacted personal address and telephone information from the forms provided, but did not redact the names of the individuals or any business contact information that they may have provided. She further alleges that the redaction was done to protect the individual right of privacy of these applicants. Ms. Gong does not provide a copy of the email transmittal of these redacted documents, so it is unclear whether that email response explained the redaction or provided any justification for it to Complainant.

Ms. Gong further alleges that, upon receipt of the email and redacted documents, Complainant objected to the redactions the Department had performed on the documents. She further states that on December 11, 2012, the Department sent a writing to Complainant "explaining again why [the Department] was redacting home address and phone numbers from the application forms and providing legal citations for those redactions."

Ms. Gong's response to the Complaint then contains an extensive legal analysis of why the Department was justified in redacting the private contact information from the berth applications, which I will not repeat here.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- What exactly was the Department's written response on December 2, 2012?
- Did the Department's December 2, 2012 response include a written justification for the redaction of the documents provided and cite to the exemptions on which it relied for such redaction?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Did the Department timely respond to the records request under Section 67.21(b)?
- Were the records at issue covered by Section 67.24(e)(1) of the Ordinance?
- Did the Department respond in the manner required by Section 67.24 or the Ordinance?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 4
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

SEC. 67.1 FINDINGS AND PURPOSE.
The Board of Supervisors and the People of the City and County of San Francisco find and declare:
(a) Government's duty is to serve the public, reaching its decisions in full view of the public.
(b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
(c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
(d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
(e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.
(f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
(g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS; ADMINISTRATIVE APPEALS.
(a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
(b) A *custodian of a public record* shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 5
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.
Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

(e) Contracts, Bids and Proposals
(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(l) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

CALIFORNIA PUBLIC RECORDS ACT

6254. EXEMPTION OF PARTICULAR RECORDS
Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
[. . .]
(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
[. . .]
(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 6
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

CALIFORNIA CONSTITUTION, ART. I, § 3 (PROPOSITION 59) A. ARTICLE 1
SEC. 3. (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.
(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.
(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.
(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.
(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.
(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.
(Added Nov. 5, 1974. Amended by Stats. 2004, Res. c. 1 (S.C.A.1) (Prop. 59, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

Ausberry, Andrea

From: complaints@sfgov.org
Sent: Wednesday, December 12, 2012 2:57 PM
To: SOTF
Subject: Sunshine Complaint

To:sotf@sfgov.org
Email:complaints@sfgov.org
DEPARTMENT:san francisco park and recreation
CONTACTED:Olive Gong
PUBLIC_RECORDS_VIOLATION:Yes
PUBLIC_MEETING_VIOLATION:No
MEETING_DATE:
SECTIONS_VIOLATED:67.21b 67.24e1 67.24i
DESCRIPTION:On November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the dobuments be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.
HEARING:Yes
PRE-HEARING:Yes
DATE:12/12/12
NAME:dominic maionchi
ADDRESS:250 avila street
CITY:san francisco ca
ZIP:94123
PHONE:4153858278
CONTACT_EMAIL:dm567@pacbell.net
ANONYMOUS:
CONFIDENTIALITY_REQUESTED:No

SOTF

From: dm567@pacbell.net
Sent: Saturday, January 26, 2013 8:40 AM
To: SOTF
Cc: Gong, Olive
Subject: Fwd: Mediation Response Received -SOTF Complaint 12058 - Dominic Maloncbi v Rec and Park Dept
Attachments: Response to Complaint 12058 - Dominic Maloncbi v Rec and Park Dept.pdf; Exhibit A.pdf

Dear Andrea,

I have not heard back. I informed you that the documents did not complete my request. See below. Have you scheduled a hearing date yet?

Thank you,

dom

dominic maloncbi
dm567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>
Subject: Re: Mediation Response Received -SOTF Complaint 12058 - Dominic Maloncbi v Rec and Park Dept
Date: December 21, 2012 10:35:30 AM PST
To: SOTF <sotf@sfgov.org>

Dear Honorable Members, Sunshine Ordinance Task Force,

The provided documents do not complete my request. Please schedule a hearing date.

The documents provided do not
dominic maloncbi
dm567@pacbell.net

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On Dec 20, 2012, at 6:38 PM, SOTF <sotf@sfgov.org> wrote:

Good Afternoon,

The SOTF Office is in receipt of a response from the Recreation and Park Department ,regarding your above mentioned complaint case.

The Respondent was notified of your complaint, in an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force. The following email and attached documents are the Respondent's response/records you requested.

The SOTF Office will consider your case to be resolved, unless you respond to whether the documents the Respondent has provided completes your request.

Thank you,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415-554-7724 | Fax 415-554-5163

sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
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Complete a Board of Supervisors Customer Service Satisfaction form by clicking: Here

From: Gong, Olive
Sent: Wednesday, December 19, 2012 3:18 PM
To: SOTF
Cc: Ausberry, Andrea; McArthur, Margaret
Subject: Response to SOTF Complaint 12058 - Dominic Malonchi v Rec and Park Dept

Dear SOTF,

Please see attached response to Complaint # 12058 - Dominic Malonchi v Rec and Park Dept.

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

To: Honorable Members. Sunshine Ordinance Task Force

From: Olive Gong, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Malonchi v. Recreation and Park Department
Complaint # 12058

We write in response to the complaint Dominic Malonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Malonchi alleges that RPD violated (1)"Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24f." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Malonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Malonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(i); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Malonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Malonchi asked for "copies of the contracts for all people on the 90 foot wait list."

RPD responded to Malonchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Malonchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Malonchi.

The Wait List applications Malonchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Malonchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Malonchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Malonchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

A. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

"RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ..." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malonchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Malonchi in response to his public records request.

1. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999); see also Lesly v. Med. Bd., 78 Cal. App. 4th 465, 466 (2000) ("individuals have a substantial privacy interest in their home addresses"); Sheet Metal Workers v. Dep't of Veteran Affairs, 135 F.3d 691, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits that would follow disclosure." Id. at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Id. at p. 500–501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See Sheet Metal Workers Int'l, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

2. There Is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information Is Unrelated to RPD's Performance of Its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. Braun v.

City at Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers at Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); Local 1274, Ill. Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); Voinche v. F.B.I. (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, as far as we can tell, is nil – served by Malonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." Id. at 1020. Because the applicants' home address information would not shed light on the relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also Painting Indus. of Hawaii, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); Local 1274, Ill. Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); Sheet Metal Workers, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Malonchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Malonchi.

III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Malonchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Malonchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form – the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

Olive Gong
Custodian of Records

Attachments: Exhibit A

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

NANCY MUELLER [redacted] NANCY S. MUELLER [redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted] O.K.
Other: 0

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy-Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, current contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to remain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information as my good standing on the Waiting List may be cancelled.

Renewal: X LUCA BARCATTI FOR NANCY S. MUELLER

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00 CK#1443 11/9/11

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Walt Pitcos [redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 510-304-4055

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, current contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to remain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information as my good standing on the Waiting List may be cancelled.

Renewal: X

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00 CK

11 NOV 22 AM 2:25

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | Phone: (415) 831-2700 | www.sfrecpark.org

Edwin M. Lee, Mayor
Philip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 3, 2011

Print Name
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Office: 916-275-2721

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my Renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes in my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00 CHECK #1107 12/5/11

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-6715 | WEB: sfrecpark.org

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL: 415.831.6725 FAX: 415.292.0411 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): Jason (Last) Hollowway

MAILING ADDRESS: [redacted] (APT NO.) [redacted]

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME [redacted] WORK): (___) _____

CURRENT BOAT INFORMATION:

POWER: ___ SAIL: ___ LOA (Tip-to-Tip) _____ DRAFT: _____

NO BOAT BUT PLAN TO GET: POWER: ___ SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' __ 90' ✓

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: ___

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

$75.00 CHECK #5 02/29/12

Mayor Edwin Lee
General Manager Philip A. Ginsburg

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL 415.831.6322 FAX 415.292.0515 WEB www.sfrecpark.org

PLEASE COMPLETE THIS FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): PAUL (Last) REYFF

MAILING ADDRESS: [redacted] (APT NO.) _____

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME) [redacted] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION:

POWER: X SAIL: ____ LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER: ____ SAIL: ____

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' __ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: X

Renewal: ____

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

Mayor Gavin Newsom
General Manager Phillip A. Ginsburg

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TO: Sunshine Task Force

FROM: Dominic Maionchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:

1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24l

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

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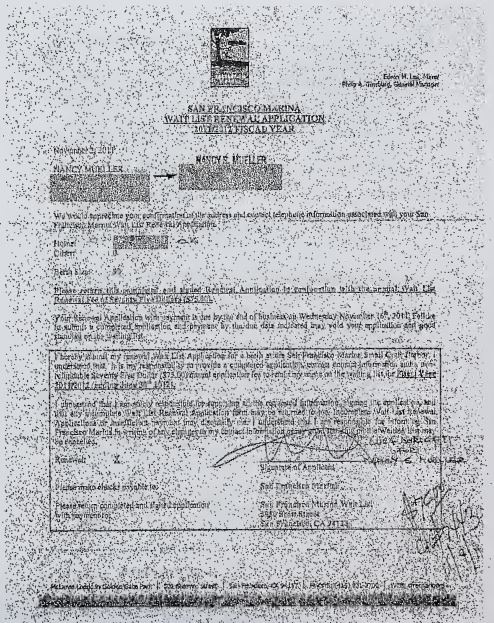
becomes available. If RPD did not provide a slip when available, the wait list applicant could enforce the agreement against RPD. Furthermore, there is consideration for this agreement in the form of a fee that has been approved by the controller's office. Simply pretending that this is not a contract does not make it something else.

RPD continues to argue that even if it is a contract that there is nothing in the sunshine ordinance that compels the city to disclose private residences that may be listed in the contract. RPD is again mistaken. First, the ordinance clearly states that contracts "shall be open for inspection immediately." The ordinance does not differentiate between contracts between businesses or individuals. Furthermore, a careful reading of the ordinance tells one that one should err on the side of disclosing information rather than not disclosing information. According to section 67.27 withholding is to be kept to a minimum. Furthermore, there is no exempt information on the wait list agreement under the California Public Records Act.

The un-redacted berthing agreements between the RPD and individuals were deemed by the Sunshine Task Force to be available under the Sunshine Ordinance to me on July 28, 2009. (Case 09032) The wait list agreements are no different and should also be made available to me un-redacted also. I would like the addresses so that I can inform the wait list applicants by mail to their contact address of transactions entered into by RPD that may have violated their right to a slip. In my opinion, that is why we have a Sunshine Ordinance in the first place; we need to keep everyone honest.

Regards,



Edwin M. Lee, Mayor
Phillip A. Arntzenius, Interim Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2010 / 11 FISCAL YEAR

November 5, 2010

NANCY S. MUELLER

NANCY MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Berth Application.

Name: NANCY MUELLER
Client: 0
Berth Size: 35'

Please review this information and sign the Renewal Application in conjunction with your original Wait List Application for Specific Facilities (SF 1071).

Your Renewal Application with payment is due by the end of business on Wednesday, November 10th, 2010. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby attest that my personal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor is current and that it is my responsibility to provide a completed application, with all required information, and the Non-Refundable Seventy-five Dollar ($75.00) annual administrative fee to maintain my name on the waiting list for Fiscal Year 2010/2011 (ending June 30, 2011).

I understand that I am solely responsible for providing all the required information, and that I am entitled to only one (1) slip assignment. Wait List Renewal Applications may be returned to me incomplete. Wait List Renewal Applications or modifications received may disqualify me / us/ and I am responsible for berthing in San Francisco Marina by the end of the current fiscal year. Failure to do so may result in my / our Wait List Application being cancelled.

Applicant: NANCY S. MUELLER

Applicant's Signature: [signature]

Date: 11/5/2010

Furthermore, I accept any slip that is offered to me:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List
Slip Assistance
San Francisco, CA 94123

Marinas Open for Construction Fun! | 705 Sherry Street | San Francisco, CA 94107 | Phone: (415) 831-6750 | www.sfmarinas.com

Edwin M. Lee, Mayor
Phillip A. Chanberlin, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Neil Pinard
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 510-504-4035

Berth Size: 50

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X _____
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

19 NOV 22 AM 8:28

Edwin M. Lee, Mayor
Phillip A. Chanberlin, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Peter Shaw
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 916-275-2721

Berth Size: 50

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X _____
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
(tel) 415 921 6322 (fax) 415 292 2019 (e-mail) yachtharbor@sfrpd.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): Jason (Last): Holladay

MAILING ADDRESS: [redacted] (APT NO.): [redacted]

(CITY): [redacted] (STATE): CA (ZIP): [redacted]

TELEPHONE (HOME): [redacted] (WORK): (___) _____

CURRENT BOAT INFORMATION

POWER: ____ SAIL: ____ LOA (Tip-to-Tip) ____ DRAFT: ____

NO BOAT BUT PLAN TO GET: POWER: ____ SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application)

25' ___ 30' ___ 35' ___ 40' ___ 45' ___ 50' ___ 60' ___ 80' X 90'

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application fee will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain on the Wait List. I understand and agree that an incomplete Wait List application form may preclude my placement on the Wait List. I understand and agree that an incomplete Wait List application form may preclude my placement on the Wait List. I must submit in writing any changes in my contact information will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: ____

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina-Wait List
3950 Scott St.
San Francisco, CA 94123

#1550 Deposit 03/01/12

Mayor Edwin M. Lee
General Manager Philip A. Ginsburg

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City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
(tel) 415 921 6322 (fax) 415 292 2019 (e-mail) yachtharbor@sfrpd.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2/1/12

APPLICANT NAME (First): Paul (Last): Reyes

MAILING ADDRESS: [redacted] (APT NO.): ____

(CITY): [redacted] (STATE): CA (ZIP): [redacted]

TELEPHONE (HOME): [redacted] (WORK): (415) 860-4955

CURRENT BOAT INFORMATION

POWER: X SAIL: ____ LOA (Tip-to-Tip): 26' DRAFT: 6.5'

NO BOAT BUT PLAN TO GET: POWER: ____ SAIL: ____

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application)

25' ___ 30' ___ 35' ___ 40' ___ 45' ___ 50' ___ 60' ___ 80' ___ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application fee will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain on the Wait List. I understand and agree that an incomplete Wait List application form may preclude my placement on the Wait List. I understand and agree that an incomplete Wait List application form may preclude my placement on the Wait List. I must submit in writing any changes in my contact information will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: X

Renewal: ____

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina-Wait List
3950 Scott St.
San Francisco, CA 94123

#1550 Deposit 2/1/12

Mayor Edwin M. Lee
General Manager Philip A. Ginsburg

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Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olive Gong, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Complaint Malanchi v. Recreation and Park Department
Complaint # 12058

We write in response to the complaint Dominic Molanchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Molanchi alleges that RPD violated (1)"Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e I," and (3) "Section 67.24\." His allegation appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Molanchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Molanchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(B); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Molanchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Molanchi asked for "copies of the contracts for all people on the 90 foot wait list."

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

RPD responded to Molanchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Molanchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Molanchi.

The Wait List applications Molanchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Molanchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Molanchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Molanchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption. Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article 1 Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malanchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Malanchi in response to his public records request.

2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999); see also Lorig v. Med. Bd., 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); Sheet Metal Workers v. Dep't of Veterans Affairs, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits that would follow disclosure." Id. at 498. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Id. at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See Sheet Metal Workers Int'l, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

3. There is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information is Unrelated to RPD's Performance of its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. Braun v.

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employer payroll because disclosure only marginally useful in analyzing "what the government is up to"); Local 1274, Il. Fed. of Teachers v. Nist (Il. App. 1997) 287 Il. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); Yakima v. F.B.I., D.C.D. 1996) 940 F. Supp. 323, 330 (wastage of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); Int'l Tech'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339, (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private address and phone information clearly outweighs the public interest – which, as far as we can tell, is nil – served by Malanchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its duty[]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." Id. at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also Painting Indus. of Hawaii, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to.'"); Local 1274, Il. Fed. of Teachers, 287 Il. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); Sinnott v. Inl'd Workers, 135 F.3d at 903 ("the release of names, addresses and similar private information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Molonchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Molonchi.

III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Molonchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Molonchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form – the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants must often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 10058.

Thank you for your time and consideration.

Olive Gong
Custodian of Records

Attachments: Exhibit A

File No. 12058

SOTF Item No.
CAC Item No. 3

SUNSHINE ORDINANCE TASK FORCE
AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force (SOTF) Date:

Compliance and Amendments Committee (CAC) Date: July 16, 2013

CAC/SOTF

- ☒ ☐ Memorandum
- ☒ ☐ Order of Determination
- ☒ ☐ Complaint and Supporting documents
- ☒ ☐ Respondent's Response
- ☐ ☐ Minutes
- ☐ ☐
- ☐ ☐
- ☐ ☐
- ☐ ☐
- ☐ ☐
- ☐ ☐

OTHER

- ☐ ☐ _____
- ☐ ☐ _____
- ☐ ☐ _____
- ☐ ☐ _____
- ☐ ☐ _____

Completed by: Andrea Ausberry Date July 10, 2013
Completed by: Date

*An asterisked item represents the cover sheet to a document that exceeds 75 pages. The complete document is in the file.

ORDER OF DETERMINATION
June 12, 2013

DATE THE DECISION ISSUED
May 1, 2013

DOMINIC MAIONCHI V. RECREATION AND PARKS DEPARTMENT (CASE NO. 12058)

FACTS OF THE CASE

Complainant Dominic Maioncht ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2012 records request, and that they also failed to provide unredacted copies of the records requested.

COMPLAINT FILED

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(l) of the Ordinance.

HEARING ON THE COMPLAINT

On May 1, 2013, Complainant, Dominic Maioncht appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented Recreation and Park Department's defense.

The issue in the case is whether Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force finds that the testimony of Complainant, Dominic Maioncht to be persuasive and finds that Section 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find the testimony provided by Respondent, Olive Gong persuasive with regard to alleged violation of Section 67.26.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that Recreation and Park Department violated Section 67.26 of the Sunshine Ordinance for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 16, 2013.

CITY AND COUNTY OF SAN FRANCISCO SUNSHINE ORDINANCE TASK FORCE

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 1, 2013, by the following vote: (Knee / Hyland)
Ayes: Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Noes: David
Absent: Washburn

Kitt Grant

Kitt Grant, Chair
Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney
Dominic Maionchi, Complaint
Olive Gong, Recreation and Park Department, Respondent

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

JERRY THREET
Deputy City Attorney

Direct Dial: (415) 554-3914
Email: jerry.threet@sfgov.org

MEMORANDUM

TO: Sunshine Ordinance Task Force

FROM: Jerry Threet
Deputy City Attorney

DATE: April 26, 2013

RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

BACKGROUND

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2013 records request, and that they also failed to provide unredacted copies of the records requested.

COMPLAINT

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

JURISDICTION

The Recreation and Parks Department is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Department.

APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request.
- Section 67.24 governs public information that must be disclosed under the Ordinance, notwithstanding exceptions under the Public Records Act.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.

APPLICABLE CASE LAW:

None.

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Complainant alleges as follows:

> November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v.

MEMORANDUM

RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24f I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

In a letter dated December 19, 2011, Olive Gong responded on behalf of the Department to complaint. Gong first alleges that the records request was received by email after 5 p.m. on Thursday, November 22, 2012, which was a holiday and thus the Department was not open for business. Ms Gong thus alleges that the Department actually received the request on Monday, November 26, 2012. She thus concludes that the Department's email response on December 2, 2012, 7 days later, was within the 10 day response time required by the Ordinance. Ms. Gong further alleges that the response included electronic copies of the five application forms for 90 foot berths that were responsive and in the Department's custody.

Ms. Gong further alleges that the Department redacted personal address and telephone information from the forms provided, but did not redact the names of the individuals or any business contact information that they may have provided. She further alleges that the redaction was done to protect the individual right of privacy of these applicants. Ms. Gong does not provide a copy of the email transmittal of these redacted documents, so it is unclear whether that email response explained the redaction or provided any justification for it to Complainant.

Ms. Gong further alleges that, upon receipt of the email and redacted documents, Complainant objected to the redactions the Department had performed on the documents. She further states that on December 11, 2012, the Department sent a writing to Complainant "explaining again why [the Department] was redacting home address and phone numbers from the application forms and providing legal citations for those redactions."

Ms. Gong's response to the Complaint then contains an extensive legal analysis of why the Department was justified in redacting the private contact information from the berth applications, which I will not repeat here.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- What exactly was the Department's written response on December 2, 2012?
- Did the Department's December 2, 2012 response include a written justification for the redaction of the documents provided and cite to the exemptions on which it relied for such redaction?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Did the Department timely respond to the records request under Section 67.21(b)?
- Were the records at issue covered by Section 67.24(e)(1) of the Ordinance?
- Did the Department respond in the manner required by Section 67.24 or the Ordinance?

MEMORANDUM

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 4
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

SEC. 67.1 FINDINGS AND PURPOSE .
The Board of Supervisors and the People of the City and County of San Francisco find and declare:
(a) Government's duty is to serve the public, reaching its decisions in full view of the public.
(b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
(c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
(d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
(e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.
(f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
(g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS; ADMINISTRATIVE APPEALS.
(a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
(b) A *custodian of a public record* shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 5
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.
Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

(e) Contracts, Bids and Proposals
(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(l) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

CALIFORNIA PUBLIC RECORDS ACT

6254. EXEMPTION OF PARTICULAR RECORDS
Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
[. . .]
(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
[. . .]
(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 6
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

CALIFORNIA CONSTITUTION, ART. I, § 3 (PROPOSITION 59) A. ARTICLE 1
SEC. 3. (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.
(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.
(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.
(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.
(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.
(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.
(Added Nov. 5, 1974. Amended by Stats. 2004, Res. c. 1 (S.C.A.1) (Prop. 59, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

Ausberry, Andrea

From: Gong, Olive
Sent: Thursday, June 13, 2013 2:49 PM
To: Threet, Jerry
Cc: dm567@pacbell.net; SOTF; kitt grant
Subject: RE: Response to Order of Determination - 12058

Hi Mr. Threet,

Yes, your statement in the below email is correct.

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

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Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

From: Jerry.Threet@sfgov.org [mailto:Jerry.Threet@sfgov.org]
Sent: Thursday, June 13, 2013 2:46 PM
To: Gong, Olive
Cc: dm567@pacbell.net; SOTF; kitt grant
Subject: RE: Response to Order of Determination - 12058

Ms. Gong –

In other words, the department will not comply with the OD, and relies on the reasoning in its original response to the complaint.

Is that correct?

Jerry Threet, Deputy City Attorney
Neighborhood and Resident Safety Division
Counsel to Sunshine Task Force
Office of City Attorney Dennis J. Herrera
1390 Market Street, 6th Floor
San Francisco, CA 94102
Direct: (415) 554-3914
Fax: (415) 437-4644
jerry.threet@sfgov.org

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From: "Gong, Olive" <olive.gong@sfgov.org>
To: "Threet, Jerry" <Jerry.Threet@sfgov.org>,
Cc: "dm567@pacbell.net" <dm567@pacbell.net>, SOTF <sotf@sfgov.org>, kitt grant <sunshinechairgrant@gmail.com>
Date: 08/13/2013 02:39 PM
Subject: RE: Response to Order of Determination - 12058

Hi Mr. Threet,

Yes, I am confirming that we have just re-sent the same letter. The Department has not changed its stance in regards to the complaint.

Sincerely,
Olive Gong

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

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Sign up for our e-News

Reduce, Reuse, Recycle

From: Jerry.Threet@sfgov.org [mailto:Jerry.Threet@sfgov.org]
Sent: Thursday, June 13, 2013 2:33 PM
To: Gong, Olive
Cc: dm567@pacbell.net; SOTF; kitt grant
Subject: Re: Response to Order of Determination - 12058

Ms. Gong -

I am confused by the Department's response to the OD. You have simply sent the response previously provided by the department to the complaint.

Can you please clarify the intent of this response?

Jerry Threet, Deputy City Attorney

Neighborhood and Resident Safety Division
Counsel to Sunshine Task Force
Office of City Attorney Dennis J. Herrera
1390 Market Street, 6th Floor
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Direct: (415) 554-3914
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From: "Gong, Olive" <olive.gong@sfgov.org>
To: SOTF <sotf@sfgov.org>
Cc: "Threet, Jerry" <Jerry.Threet@sfgov.org>, kitt grant <sunshinechairgrant@gmail.com>, "dm567@pacbell.net" <dm567@pacbell.net>
Date: 08/13/2013 01:44 PM
Subject: Response to Order of Determination - 12058

Dear SOTF,
Please find attached the department's response to the Order of Determination.
Best regards,
Olive Gong

Olive Gong
Custodian of records
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

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Reduce, Reuse, Recycle

From: SOTF
Sent: Wednesday, June 12, 2013 4:09 PM
To: Gong, Olive; dm567@pacbell.net
Cc: Threet, Jerry; kitt grant
Subject: SOTF - Order of Determination - 12058

Good Afternoon,

Attached is the Order of Determination from the Sunshine Ordinance Task Force, regarding the above titled complaint.

Kind regards,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415.554.7724 | Fax 415.554.5163
sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
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[attachment "Exhibit A.pdf" deleted by Jerry Threet/CTYATT] [attachment "Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf" deleted by Jerry Threet/CTYATT]

Ausberry, Andrea

From:	dm567@pacbell.net
Sent:	Tuesday, June 04, 2013 4:07 PM
To:	Gong, Olive
Cc:	SOTF
Subject:	Re: Response to your sunshine request

Dear Olive,

Are the powers that be aware that the Sunshine Task Force Ruled that the documents should not be redacted in their ruling?

Is your department refusing to abide by their ruling?

Regards,

dominic maionchi
dm567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

On Jun 4, 2013, at 4:01 PM, "Gong, Olive" <olive.gong@sfgov.org> wrote:

Hi Dominic,

We have received the documents requested in your request dated 5-31-2013, received Monday, 6-3-2013 (and copied below) and will send them to you as soon as they have been reviewed and by the deadline of 6-13-2013, though I expect to have them ready by tomorrow.

In your new request, dated 6-4-2013, you asked to see original documents, however, as mentioned previously, we do not release waiting information without redacting personal information first.

Let me know if you have any further questions,
Olive

Olive Gong
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Reduce, Reuse, Recycle

Please consider the environment before printing this e-mail

From: dm567@pacbell.net [mailto:dm567@pacbell.net]
Sent: Friday, May 31, 2013 8:41 PM
To: Gong, Olive
Subject: Re: sunshine request

Dear Olive,

This email is meant for you.

This is a NEW Sunshine request in addition to my sunshine request on May 29th.

Please send me the wait list applications (contracts) for the 90 foot wait list as they are in the records as of today. There may have been changes to them since the last time I received them? Please don't tell me that there have been no changes. I would like to see copies of them as they sit in the files today.

Dom

dominic maionchi
dm567@pacbell.net

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Ausberry, Andrea

From: dm567@pacbell.net
Sent: Tuesday, June 04, 2013 8:26 AM
To: SOTF
Subject: Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Andrea,

Rec and Park is refusing to provide the documents. They tell me I already received them. How do I get this case assigned to a committee of the task force for enforcement follow up?

I am now officially filing a second complaint with the task force for the same documents. Put me on the docket.

Dom

dominic maionchi
dm567@pacbell.net

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dominic maiorchi
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From: "Gong, Olive" <olive.gong@sfgov.org>
To: "Threet, Jerry" <Jerry.Threet@sfgov.org>,
Cc: "dm567@pacbell.net" <dm567@pacbell.net>, SOTF <sotf@sfgov.org>, kiti grant <sunshinechairgrant@gmail.com>
Date: 05/13/2013 02:39 PM
Subject: RE: Response to Order of Determination - 12058

Hi Mr. Threet,

Yes, I am confirming that we have just re-sent the same letter. The Department has not changed its stance in regards to the complaint.

Sincerely,
Olive Gong

Olive Gong
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Sent: Thursday, June 13, 2013 2:33 PM
To: Gong, Olive
Cc: dm567@pacbell.net; SOTF; kiti grant
Subject: Re: Response to Order of Determination - 12058

Ms. Gong -

I am confused by the Department's response to the OD. You have simply sent the response previously provided by the department to the complaint.

Can you please clarify the intent of this response?

Jerry Threet, Deputy City Attorney

Neighborhood and Resident Safety Division
Counsel to Sunshine Task Force
Office of City Attorney Dennis J. Herrera
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San Francisco, CA 94102
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To: SOTF <sotf@sfgov.org>,
Cc: "Threet, Jerry" <jerry.threet@sfgov.org>, kit grant <sunshinechairgrant@gmail.com>, "dm567@pacbell.net" <dm567@pacbell.net>
Date: 06/13/2013 01:44 PM
Subject: Response to Order of Determination - 12058

Dear SOTF,
Please find attached the department's response to the Order of Determination.
Best regards,
Olive Gong

Olive Gong
Custodian of records
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McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

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From: SOTF
Sent: Wednesday, June 12, 2013 4:09 PM
To: Gong, Olive; dm567@pacbell.net
Cc: Threet, Jerry; kitt grant
Subject: SOTF - Order of Determination - 12058

Good Afternoon,

Attached is the Order of Determination from the Sunshine Ordinance Task Force, regarding the above titled complaint.

Kind regards,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415-554-7724 | Fax 415-554-5163
sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
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[attachment "Exhibit A.pdf" deleted by Jerry Threet/CTYATT] [attachment "Response to Complaint 12058 - Dominic Malonchi v Rec and Park Dept.pdf" deleted by Jerry Threet/CTYATT]

Ausberry, Andrea

From: complaints@sfgov.org
Sent: Wednesday, December 12, 2012 2:57 PM
To: SOTF
Subject: Sunshine Complaint

To:sotf@sfgov.org
Email:complaints@sfgov.org
DEPARTMENT:san francisco park and recreation
CONTACTED:Olive Gong
PUBLIC_RECORDS_VIOLATION:Yes
PUBLIC_MEETING_VIOLATION:No
MEETING_DATE:
SECTIONS_VIOLATED:67.21b 67.24e1 67.24i
DESCRIPTION:On November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 3, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.
HEARING:Yes
PRE-HEARING:Yes
DATE:12/12/12
NAME:dominic maionchi
ADDRESS:250 avila street
CITY:san francisco ca
ZIP:94123
PHONE:4153858278
CONTACT_EMAIL:dm567@pacbell.net
ANONYMOUS:
CONFIDENTIALITY_REQUESTED:No

SOTF

From: dm567@pacbell.net
Sent: Saturday, January 26, 2013 9:40 AM
To: SOTF
Cc: Gong, Olive
Subject: Fwd: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept
Attachments: Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf; Exhibit A.pdf

Dear Andrea,

I have not heard back. I informed you that the documents did not complete my request. See below. Have you scheduled a hearing date yet?

Thank you,

dom

dominic maionchi
dm567@pacbell.net

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Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>
Subject: Re: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept
Date: December 21, 2012 10:35:30 AM PST
To: SOTF <sotf@sfgov.org>

Dear Honorable Members, Sunshine Ordinance Task Force,

The provided documents do not complete my request. Please schedule a hearing date.

The documents provided do not
damiala malonchi
dm567@sbcglobal.net

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On Dec 20, 2012, at 6:38 PM, SOTF <sotf@sfgov.org> wrote:

Good Afternoon,

The SOTF Office is in receipt of a response from the Recreation and Park Department regarding your above mentioned complaint case.

The Respondent was notified of your complaint, in an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force. The following email and attached documents are the Respondent's response/records you requested.

The SOTF Office will consider your case to be resolved. Unless you respond to whether the documents the Respondent has provided completes your request.

Thank you,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415-554-7724 | Fax 415-554-5163

sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
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From: Gong, Olive
Sent: Wednesday, December 19, 2012 3:18 PM
To: SOTF
Cc: Ausberry, Andrea; McArthur, Margaret
Subject: Response to SOTF Complaint 12058 - Dominic Malonchi v Rec and Park Dept

Dear SOTF,

Please see attached response to Complaint # 12058 - Dominic Malonchi v Rec and Park Dept.

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

Edwin M. Lee, Mayor
Phillip A. Ginsberg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olive Gong, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Molonchi v. Recreation and Park Department
Complaint # 12058

We write in response to the complaint Dominic Molonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Molonchi alleges that RPD violated (1)"Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24." His allegation appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Molonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Molonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(f); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Molonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Molonchi asked for "copies of the contracts for all people on the 90 foot wait list."

RPD responded to Molonchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Molonchi electronic copies of the live Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Molonchi.

The Wait List applications Molonchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Molonchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Molonchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Molonchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

i. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption. Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ..." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article 1, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malanchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Malanchi in response to his public records request.

2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999); see also Lorig v. Med. Bd., 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); Sheet Metal Workers v. Dep't of Veteran Affairs, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 494-501 (1994) ("Dep't at Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of (unsolicited) union-related mail ... telephone calls or visits, that would follow disclosure." Id. at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Id. at p. 500–501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See Sheet Metal Workers Int'l, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

3. There Is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information Is Unrelated to RPD's Performance of Its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. Braun v.

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); Local 1276, Ill. Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); Voinche v. F.B.I. (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Malanchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the (applicants) for the public to have access to vital information about City's performance of its (duty)." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." Id. at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also Painting Indus. of Hawaii, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); Local 1274, Ill. Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); Sheet Metal Workers, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Malonchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Malonchi.

III. *RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.*

Finally, Malonchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Malonchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form – the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants must often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12038.

Thank you for your time and consideration.

Olivia Gong

Olive Gong
Custodian of Records

Attachments: Exhibit A

Edwin M. Lee, Mayor
Philip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

NANCY MUELLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted] O.K.
Other: 0

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, current business information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my annual information or my position in the Waiting List may be cancelled.

Renewal: X

LUCA BARTOLI FOR NANCY S. MUELLER
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00
CK# 1113
11/9/11

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Mail Status:
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 510-504-4055

Berth Size: 50

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes in my contact information or any other pending on the Waiting List may be cancelled.

Renewal: X _____ Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List 3950 Scott Street San Francisco, CA 94123

$75.00 CC

11 NOV 22 AM 8:25

S.F. MARINA

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Mail Status:
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 916-275-2721

Berth Size: 40

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes in my contact information or any other pending on the Waiting List may be cancelled.

Renewal: X _____ Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List 3950 Scott Street San Francisco, CA 94123

$75.00 CC 11/7/11 12/5/11

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL: 415.831.6753 FAX: 415.292.7015 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): Jason (Last) Hollowony

MAILING ADDRESS: [redacted] (APT NO.) ___

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME) [redacted] (WORK): (___) ___

CURRENT BOAT INFORMATION:

POWER: ___ SAIL: ___ LOA (Tip-to-Tip): ___ DRAFT: ___

NO BOAT BUT PLAN TO GET: POWER: ___ SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' (90' V)

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: ___

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

#1500 CHECK 02/27/12

Mayor Edwin Lee
General Manager Phillip A. Ginsburg

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL: 415.831.6753 FAX: 415.292.7015 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): Paul (Last) Reyff

MAILING ADDRESS: [redacted] (APT NO.) ___

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME) [redacted] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION:

POWER: X SAIL: ___ LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER: ___ SAIL: ___

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' __ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: X

Renewal: ___

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

#1500 CHECK 3/7/12

Mayor Edwin Lee
General Manager Phillip A. Ginsburg

TO: Sunshine Task Force

FROM: Dominic Maionchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:
1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24l

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

becomes available. If RPD did not provide a slip when available, the wait list applicant could enforce the agreement against RPD. Furthermore, there is consideration for this agreement in the form of a fee that has been approved by the controller's office. Simply pretending that this is not a contract does not make it something else.

RPD continues to argue that even if it is a contract that there is nothing in the sunshine ordinance that compels the city to disclose private residences that may be listed in the contract. RPD is again mistaken. First, the ordinance clearly states that contracts "shall be open for inspection immediately." The ordinance does not differentiate between contracts between businesses or individuals. Furthermore, a careful reading of the ordinance tells one that one should err on the side of disclosing information rather than not disclosing information. According to section 67.27 withholding is to be kept to a minimum. Furthermore, there is no exempt information on the wait list agreement under the California Public Records Act.

The un-redacted berthing agreements between the RPD and individuals were deemed by the Sunshine Task Force to be available under the Sunshine Ordinance to me on July 28, 2009. (Case 09032) The wait list agreements are no different and should also be made available to me un-redacted also. I would like the addresses so that I can inform the wait list applicants by mail to their contact address of transactions entered into by RPD that may have violated their right to a slip. In my opinion, that is why we have a Sunshine Ordinance in the first place; we need to keep everyone honest.

Regards,

Edwin M. Lee, Mayor
Phillip A. Chinelly, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

NANCY S. MUELLER

NANCY MUELLER

[redacted]

Dear [redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Name: [redacted] OK
Other: 0

Berth Size: 30

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th, 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes in my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X

Signature of Applicant

NANCY S. MUELLER

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

Edwin M. Lee, Mayor
Phillip A. Chinelly, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Neil Pierce

[redacted]

Dear Neil Pierce

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Name: [redacted]
Other: 510-304-4033

Berth Size: 30

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th, 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes in my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

19 NOV 22 AM 8:25

Phillip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 3, 2011

Peter Stolz
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Name: [redacted]
Other: 916-775-2721

Berth Size: 30

Please return this completed and dated Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct payment information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application and that any incomplete Wait List Renewal Application forms may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any change in my contact information so the Waiting List may be amended.

Signed: X

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

City and County of San Francisco
Recreation and Park Department

San Francisco Wait Harbor
3950 Scott Street, San Francisco, CA 94123
TEL: 415 831 6322 FAX: 415 292 2015 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): Jason (Last): Holloway

MAILING ADDRESS: [redacted] (APT NO.)

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME) [redacted] (WORK): ( )

CURRENT BOAT INFORMATION:

POWER: ___ SAIL: ___ LOA (Tip-to-Tip) ___ DRAFT: ___

NO BOAT BUT PLAN TO GET: POWER: ___ SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' ___ 30' ___ 35' ___ 40' ___ 45' ___ 50' ___ 60' ___ 80' ___ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will retain my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ___

Renewal: ___

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

$75.00 CHECK 0424 2-22-12

Mayor Edwin M. Lee
General Manager Phillip A. Ginsburg

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
103 East Street, San Francisco, CA 94123
(415) 495-8321 FAX: 415-292-2018 www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First) Paul (Last) Revere

MAIL ING ADDRESS: [redacted] (APT NO.)

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE, (HOME) [redacted] (WORK): (415) 350-8855

CURRENT BOAT INFORMATION:

POWER: X SAIL: ____ LOA (Tip-to-Tip) 96' DRAFT 6.9'

NO BOAT BUT PLAN TO GET: POWER: ____ SAIL: ____

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application)

25' ___ 30' ___ 35' ___ 40' ___ 45' ___ 50' ___ 60' ___ 80' ___ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: X

Renewal: ____

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St
San Francisco, CA 94123

Harold Carlin Hamilton
General Manager Phillip A. Ginsburg

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Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olva Gong, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Molonchi v. Recreation and Park Department
Complaint # 12058

We write in response to the complaint Dominic Molonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Molonchi alleges that RPD violated (1)"Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24l." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Molonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Molonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 1 (B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(j); Marina Rules, Section 1.L.)

On Thanksgiving Day, Thursday, November 22, 2012, at 8:18 p.m., Molonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Molonchi asked for "copies of the contracts for all people on the 90 foot wait list."

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

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RPD responded to Malonchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 6253(b) of the Sunshine Ordinance. In response to the request, RPD emailed Malonchi electronic copies of the five Wait List application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Malonchi.

The Wait List applications Malonchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Malonchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Malonchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Malonchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption. Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malonchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Malonchi in response to his public records request.

2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999); see also Lorig v. Med. Bd., 78 Cal. App. 4th 462, 468 (2000) ("Individuals have a substantial privacy interest in their home addresses"); Sheet Metal Workers v. Dep't of Veteran Affairs, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." Id. at 498. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Id. at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See Sheet Metal Workers Int'l, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

3. There Is no Justification for Violating the Right to Privacy by Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information is Unrelated to RPD's Performance of its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. Braun v.

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "'what the government is up to'"); Local 1274, Ill. Fed. of Teachers v. Niles Ill. App. 1997) 287 Ill. App. 3d 167, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); Vainche v. F.B.I. (D.D.C. 1996) 940 F. Supp. 823, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1005 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Malonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." Id. at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best," Dep't of Defense, 510 U.S. at 497; see also Painting Indus. of Hawaii, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the governments up to'"); Local 1274, Ill. Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); Sheet Metal Workers, 135 F.3d at 903 ("the release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of this information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Malonchi or any other citizen is interested in the number and date of Wait List applications of the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Malonchi.

III. **RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.**

Finally, Malonchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application form and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application form that RPD provided Malonchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law," Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form – the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal, recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 13058.

Thank you for your time and consideration.

Olive Gong
Custodian of Records

Attachments: Exhibit A

File No. 12058

SOTF Item No. 4
CAC Item No. _____

SUNSHINE ORDINANCE TASK FORCE
AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force (SOTF) Date: November 6, 2013

Compliance and Amendments Committee (CAC) Date: _____

CAC/SOTF

- [ ] [X] Memorandum
- [ ] [X] Order of Determination
- [ ] [X] Complaint and Supporting documents
- [ ] [X] Respondent's Response
- [ ] [ ] Minutes
- [ ] [ ]
- [ ] [ ]
- [ ] [ ]
- [ ] [ ]
- [ ] [ ]
- [ ] [ ]
- [ ] [ ]

OTHER

- [ ] [ ] _____
- [ ] [ ] _____
- [ ] [ ] _____
- [ ] [ ] _____
- [ ] [ ] _____

Completed by: A. Ausberry Date 10/25/13
Completed by: _____ Date _____

*An asterisked item represents the cover sheet to a document that exceeds 75 pages. The complete document is in the file.

ORDER OF DETERMINATION
June 12, 2013

DATE THE DECISION ISSUED
May 1, 2013

DOMINIC MAIONCHI V. RECREATION AND PARKS DEPARTMENT (CASE NO. 12058)

FACTS OF THE CASE

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2012 records request, and that they also failed to provide unredacted copies of the records requested.

COMPLAINT FILED

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21 (b), 67.24(e)(1), and 67.24(l) of the Ordinance.

HEARING ON THE COMPLAINT

On May 1, 2013, Complainant, Dominic Maionchi appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented Recreation and Park Department's defense.

The issue in the case is whether Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force finds that the testimony of Complainant, Dominic Maionchi to be persuasive and finds that Section 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find the testimony provided by Respondent, Olive Gong persuasive with regard to alleged violation of Section 67.26.

DECISION AND ORDER OF DETERMINATION

The Task Force finds that Recreation and Park Department violated Section 67.26 of the Sunshine Ordinance for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 16, 2013.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 1, 2013, by the following vote: (Knee / Hyland)
Ayes: Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Noes: David
Absent: Washburn

Kitt Grant, Chair
Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney
Dominic Maionchi, Complaint
Olive Gong, Recreation and Park Department, Respondent

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

JERRY THREET
Deputy City Attorney

Direct Dial: (415) 554-3914
Email: jerry.threet@sfgov.org

MEMORANDUM

TO: Sunshine Ordinance Task Force

FROM: Jerry Threet
Deputy City Attorney

DATE: April 26, 2013

RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

BACKGROUND

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2013 records request, and that they also failed to provide unredacted copies of the records requested.

COMPLAINT

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

JURISDICTION

The Recreation and Parks Department is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Department.

APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request.
- Section 67.24 governs public information that must be disclosed under the Ordinance, notwithstanding exceptions under the Public Records Act.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.

APPLICABLE CASE LAW:

None.

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Complainant alleges as follows:

> November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v.

> RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24 I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

In a letter dated December 19, 2011, Olive Gong responded on behalf of the Department to complaint. Gong first alleges that the records request was received by email after 5 p.m. on Thursday, November 22, 2012, which was a holiday and thus the Department was not open for business. Ms Gong thus alleges that the Department actually received the request on Monday, November 26, 2012. She thus concludes that the Department's email response on December 2, 2012, 7 days later, was within the 10 day response time required by the Ordinance. Ms. Gong further alleges that the response included electronic copies of the five application forms for 90 foot berths that were responsive and in the Department's custody.

Ms. Gong further alleges that the Department redacted personal address and telephone information from the forms provided, but did not redact the names of the individuals or any business contact information that they may have provided. She further alleges that the redaction was done to protect the individual right of privacy of these applicants. Ms. Gong does not provide a copy of the email transmittal of these redacted documents, so it is unclear whether that email response explained the redaction or provided any justification for it to Complainant.

Ms. Gong further alleges that, upon receipt of the email and redacted documents, Complainant objected to the redactions the Department had performed on the documents. She further states that on December 11, 2012, the Department sent a writing to Complainant "explaining again why [the Department] was redacting home address and phone numbers from the application forms and providing legal citations for those redactions."

Ms. Gong's response to the Complaint thus contains an extensive legal analysis of why the Department was justified in redacting the private contact information from the berth applications, which I will not repeat here.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

- What exactly was the Department's written response on December 2, 2012?
- Did the Department's December 2, 2012 response include a written justification for the redaction of the documents provided and cite to the exemptions on which it relied for such redaction?

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Did the Department timely respond to the records request under Section 67.21(b)?
- Were the records at issue covered by Section 67.24(e)(i) of the Ordinance?
- Did the Department respond in the manner required by Section 67.24 of the Ordinance?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

SEC. 67.1 FINDINGS AND PURPOSE.
The Board of Supervisors and the People of the City and County of San Francisco find and declare:
(a) Government's duty is to serve the public, reaching its decisions in full view of the public.
(b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
(c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
(d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
(e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.
(f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
(g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS; ADMINISTRATIVE APPEALS.
(a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
(b) A *custodian of a public record* shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 5
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.
Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of document's and information and shall provide enhanced rights of public access to information and records:

(e) Contracts, Bids and Proposals
(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(f) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

CALIFORNIA PUBLIC RECORDS ACT

6254. EXEMPTION OF PARTICULAR RECORDS
Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

[. . .]
(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

[. . .]
(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

MEMORANDUM

TO: Sunshine Ordinance Task Force
DATE: April 26, 2013
PAGE: 6
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

CALIFORNIA CONSTITUTION, ART. I, § 3 (PROPOSITION 59) A. ARTICLE 1
SEC. 3. (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.
(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.
(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.
(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.
(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.
(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.
(Added Nov. 5, 1974. Amended by Stats. 2004, Res. c. 1 (S.C.A.1) (Prop. 59, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

12a 58

Ausberry, Andrea

From: complaints@sfgov.org
Sent: Wednesday, December 12, 2012 2:57 PM
To: SOTF
Subject: Sunshine Complaint

To:sotf@sfgov.org
Email:complaints@sfgov.org
DEPARTMENT:san francisco park and recreation
CONTACTED:Olive Gong
PUBLIC_RECORDS_VIOLATION:Yes
PUBLIC_MEETING_VIOLATION:No
MEETING_DATE:
SECTIONS_VIOLATED:67.21b 67.24c1 67.24i
DESCRIPTION:On November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24c1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.
HEARING:Yes
PRE-HEARING:Yes
DATE:12/12/12
NAME:dominic maionchi
ADDRESS:250 avila street
CITY:san francisco ca
ZIP:94123
PHONE:4153858278
CONTACT_EMAIL:dm567@pacbell.net
ANONYMOUS:
CONFIDENTIALITY_REQUESTED:No

From: dm567@pacbell.net
To: SOTF
Subject: Fwd: 90 foot slip
Date: Friday, September 06, 2013 11:20:47 AM

The task force asked for my original sunshine request to rec and park.

here it is.

As you can see from the emails, it is clear why I asked for the 90 foot wait list agreements. I actually told John what I would use them for,namely, to inform these people that their rights under their wait list agreement may have been violated.

thanks

dom

Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>
Subject: Re: 90 foot slip
Date: November 22, 2012 5:18:10 PM PST
To: "Moren, John" <John.moren@sfgov.org>
Cc: Doug <mail@matelot.com>
Bcc: nancanumber1@aol.com, Olive Gong <Olive.Gong@sfgov.org>

John,

Are you never embarrassed?

I am requesting copies of the contracts for all people on the 90 foot wait list.

dom

On Nov 22, 2012, at 10:00 AM, Moren, John wrote:

Hello Mr. Maionchi,

The berth transfer you are concerned with was resolved in the best interest of the Marina in

accordance with our policies.

Best Regards,

John Moren, CMM
Harbormaster
San Francisco Marina Small Craft Harbor
slip4.us@mac.com | sfrecpier.org

City & County of San Francisco • Recreation & Park Department • 501 Stanyan Street • San Francisco, CA 94117
Tel 415.831.6322 • Fax 415.292.2035 • e-Mail: john.moren@sfgov.org

From: dm567@pacbell.net [mailto:dm567@pacbell.net]
Sent: Thursday, November 08, 2012 8:28 AM
To: Moren, John
Subject: 90 foot slip

Dear Mr. Moren,

RE: Slip transfer from Brooke Pierson to Robert Slobe and John Areias

I have reviewed the documents for the slip transfer and object to its legality under the past and present rules and regulations adopted by the SF Park and Recreations Department.

Facts:

Slip transfer occurred on August 31, 2012 from Brooke Pierson to Robert Slobe and John Areias

Robert Slobe and John Areias took title to the boat on June 8, 2012 as per the Coast Guard Documentation.

The previous owner of the boat is unknown from the file.

Notice was given to slip holder on 6/5/12 that back due slip fees of 23,176 dollars must be paid and statement of vessel ownership must be completed.

Slip holder as of 6/5/12 was past due in rent by approximately 23,000. Back due rent wasn't paid until 8/31/12

Statement of vessel ownership listing above mentioned partners is dated 8/31/2012

Vessel purchase agreement dated 3/18/10

Bill of sale dated 4/24/12

Applicable Rules and Regulations:

The rules and regulations of the SF Marina Small Craft Harbor were adopted by the

Recreation and Park Commission on April 19th, 2012.

The deadline for submitting statements of vessel ownership naming partners was July 1st. 2012.

Change of ownership for vessels and motor vehicles does not occur in CA until title transfers, in this case June 8, 2012.

Analysis:

1. This is an improper slip transfer because seller was in violation of the Rental Agreement at the time of the transfer. Brooke Pierson was over $23,000 dollars in arrears. According to the signed Rental Agreement dated November 12th 2004, "Boat Owner agrees that his/her right to use the assigned berth shall terminate upon delinquency, for a period of 30 days, of the rental fee required under this agreement..." This language does not say "may" but rather "shall" terminate. Thus, the slip holder no longer had any legal claim to possession of the slip. Having no legitimate legal right to the slip Brooke Pierson could not transfer the slip to the buyers. The transfer must be revoked.

2. This is an improper slip transfer because seller was in violation of the rules and regulations. The rules and regulations in effect prior to April 19th, 2012 require that "An owner, upon a bona fide sale of the boat berthed therein, with the PRIOR (emphasis added) approval of the Marina Manager and the payment of a transfer fees, may assign the berth to the buyer of the boat." Brooke Pierson did not inform the harbor of her intention of selling the boat prior to the sale and transfer of the slip as required by the past and present rules and regulations.

3. Furthermore this transaction cannot be considered a transfer among partners and should have been subject to the transfer fees imposed on April 19th, 2012. There is no evidence that Robert Slobe and John Areias were ever partners of Brooke Pierson and on the same title document at the same time.
a. The Bill of Sale demonstrates that buyers purchased 100% of the boat from Sellers on 4/24/12. They were not co-owners prior to this, nor after.
b. The statement of vessel ownership wasn't signed until after the deadline for declaring partners. Furthermore, at no time were Brooke Pierson, Robert Slobe and John Areias co-owners/partners of the vessel as per title as required by the rules and regulations.
c. The documents demonstate that they were never partners even on August 31, 2012 because title was not held by all three concurrently.

4. Since this was not a transfer among partners for the reasons mentioned above, this transaction should be considered a sale invoking the one time transfer as per the rules and regulations adopted on April 19th, 2012 before title transferred. Thus buyers should not be allowed to transfer the slip in the future with the sale of the boat.

Conclusion:

1. The transaction should be cancelled and the slip returned to the marina because of violations of Marina Rules and Regulations and the Rental Agreement. Otherwise, if the slip transfer is upheld, such violations should be allowed to all slip holders going forward.

2. If the slip transfer is upheld, this was not a transfer among partners. Slobe and Arelas purchased 100% of the boat from Brooke Pierson. Thus the one time slip transfer was invoked and cannot be used again by the buyers and in addition they owe the marina the slip transfer fee due to the sale. Otherwise, no boater should be required to pay any transfer fees on future one time slip transfers.

Questions:

1. If you agree with the analysis that this was an improper slip transfer, when will you revoke this transaction?

2. If you disagree with the analysis please explain why?

3. If you believe this is a proper slip transfer was the slip transfer fee not charged to buyers?

4. If you believe this is a proper slip transfer will the new owners be allowed a further transfer of the slip with the sale of the boat in the future?

Regards,

From: dm567@pacbell.net
To: SOTF
Subject: Fwd: sunshine task force
Date: Friday, September 06, 2013 11:12:05 AM

Please add this email to the file.

It shows that I asked that Phil be informed about the sunshine request.

dom

Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>
Subject: sunshine task force
Date: December 12, 2012 2:59:19 PM PST
To: Olive Gong <Olive.Gong@sfgov.org>
Cc: sotf@sfgov.org
Bcc: nancenumber1@aol.com, Doug <mail@matelot.com>

Dear Olive Gong,

Please forward this to Phil Ginsberg.

This is a copy of my complaint to the sunshine task force that I filed online on 12/12/12:

On November 22nd, 2012 I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of
the public fill out an application that requires a fee. These applications are contracts between the applicant and the City
and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint
and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:
1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24i

I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing
takes place.

dominic maionchi
dm567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

From: Gong, Olive
To: SOTF
Subject: Response to COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
Date: Wednesday, October 30, 2013 4:44:48 PM
Attachments: Maionchi vs RPD Case 12058 response for Aug 7, 2013 Hearing and Sept 4, ...pdf
Attachment: Letter to SOTF dated Dec 19, 2012 - Response to Complaint 12....pdf

Good Afternoon Andrea,

I have attached RPD's response for the Nov 6, 2013 hearing. The response is the same as what had previously been sent for the previous hearings on October 2, 2013 , Sept 4, 2013 and August 7, 2013.

I will be attending to represent the department.

Thank you for your help,
Olive

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

From: SOTF
Sent: Thursday, October 24, 2013 4:57 PM
To: 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Ballard, Sarah; supreet.pabla@seiu1021.org; Christensen, Diana; Cantara, Gary; 'billandbobclark@access4less.net'; Lazar, Howard; Patterson, Kate; Ray Hartz Jr; Calvillo, Angela; Calderia, Rick; Nevin, Peggy; Song, Jack; Jesson, Paula; 'Elizabeth Hewson'
Cc: kitt grant; Lee, Celia; Threet, Jerry
Subject: SOTF - NOTICE OF HEARING: Task Force Meeting November 6, 2013

Good Afternoon,
You are receiving this notice, because you are named as a Complainant or Respondent in one of the following complaints scheduled with the Sunshine Ordinance Task Force, 1)to hear the merits of the complaint 2) issue a determination and/or 3)complaint has been referred from a Task Force Committee.

1. COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
2. COMPLAINT No. 12059, Supreet Pabla, SEIU Local 1022 v Human Services

Agency
3. COMPLAINT No. 13025, William Clark v Arts Commission
4. COMPLAINT No. 13026, Ray Hartz, Jr. v Angelo Colvilio, Clerk of the Board
5. COMPLAINT No. 13027, Ray Hartz, Jr. v Paulo Jesson, Office of the City Attorney
6. COMPLAINT No. 13028, Charles Pitts v Community Housing Partnership
7. COMPLAINT No. 13029, Charles Pitts v Community Housing Partnership

Date: November 6, 2013
Location: City Hall, Room 408
Time: 4:00 p.m.
Complainants: Your attendance is required for this meeting/hearing.
Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.
Documentation (evidence supporting/disputing complaint)
For a document to be considered, it must be received at least five (5) working days before the hearing (see attached Public Complaint Procedure).
For inclusion of the agenda packet, supplemental/supporting documents must be received by 12:00 pm, October 31, 2013.

Thank you,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415.554.7724 | Fax 415.554.5163
sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
Follow Us! | Twitter

Complete a Board of Supervisors Customer Service Satisfaction form by clicking HERE!

Mayor Edwin M. Lee
Phillip A. Ginsburg, General Manager

Honorable Members
Sunshine Ordinance Task Force
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102

July 29, 2013

Sent via email

Re: Complaint#12058 – Dominic Maionchi vs. Recreation and Park Department

Dear Honorable Members of the Sunshine Ordinance Task Force:

This matter concerns the Recreation and Park Department's lawful redaction on privacy grounds of individuals' home addresses and home phone numbers from records the Department provided to the Complainant in response to his public records request. As explained in the Department's detailed submission to the Task Force on December 19, 2012 (attached hereto for your reference), the Department redacted individuals' private residence addresses and home phone numbers from these records in order to protect those individuals' personal right to privacy in accordance with specific provisions of the California Constitution and the California Public Records Act.

When the Task Force first heard this matter on May 1, 2013, it found that the Department had violated Section 67.26 of the Sunshine Ordinance and ordered the Department to disclose the individuals' home addresses and phone numbers. The Department declined to disclose this personal contact information on the privacy grounds set forth in its December 19th letter. On July 16, 2013, the Compliance and Amendments Committee voted to send the case back to the full Task Force with the recommendation that it be referred to the Ethics Commission for a finding of a willful violation of the Sunshine Ordinance under Section 67.34.

For the reasons set forth in our December 19th letter, the Department has not violated the Sunshine Ordinance. And the Department certainly has not committed a "willful violation." The Ethics Commission's *Regulations for Violations of the Sunshine Ordinance* (effective January 25, 2013) define "willful violation" as "an action or failure to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance." A department's disagreement with the Task Force's interpretation of the Sunshine Ordinance does not constitute a willful violation. Further, in deciding to

McLaren Lodge, Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PH: 415.831.2700 | FAX: 415.831.2096 | www.parks.sfgov.org

Mayor Gavin Newsom
Phil A. Ginsburg, General Manager

withhold from disclosure the individuals' home addresses and phone numbers to protect their right to privacy, the Department sought and followed the advice of the City Attorney's Office. Indeed, the City Attorney's Good Government Guide instructs that "the general rule is that departments should not disclose home addresses, personal phone numbers, or personal e-mail addresses of members of the public. Such personal contact information typically sheds no light on the operations of City government." City Attorney's Good Government Guide, 2010-11 edition, p. 94. Given that the Department was acting on a well-founded belief that its redactions complied with the Sunshine Ordinance, and was following in good faith the advice of legal counsel, there is no basis for finding a "willful violation" in this case. Accordingly, the Department respectfully submits that there is no legal basis for referring this matter to the Ethics Commission.

Finally, we note that at its July 18 hearing, the Compliance and Amendments Committee also stated that the City Attorney's Office violated Section 67.21(l) of the Ordinance by advising the Department on this matter. While this allegation is directed against the City Attorney's Office, it is relevant to our operations as a City department. Under the City Charter, the City Attorney is our legal counsel, and we may consult with the City Attorney's Office on legal issues, including public records issues.

Thank you for your time and consideration.

Olive Gong
Custodian of Records

Attachments: Letter to SOTF dated December 19, 2012

Edwin M. Lee, Mayor
Phil A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

NANCY MUELLER → NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted] O.K.
Other: 0

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that my incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina, in writing of any changes to my contact information or my vessel information on the Waiting List may be cancelled.

Renewal: X

LUCA [illegible] FOR NANCY S. MUELLER
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List, 3950 Scott Street, San Francisco, CA 94123

#7500 Ck#1113 11/9/11

Edwin M. Lee, Mayor
Phil p A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Neil Pinco
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 510-501-4058

Berth Size: 1 40

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any Incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00
CC

11 NOV 22 AM 9:25
S.F. MARINA

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

Edwin M. Lee, Mayor
Phil p A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 3, 2011

Peter Skibo
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 916-275-2721

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any Incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: X
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00
CC/CHK 1109
12/5/11

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL: 415.931.2333 FAX: 415.292.2015 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): JASON (Last): Holloway

MAILING ADDRESS: [redacted] (APT NO.) ____

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME) [redacted] (WORK): (___) ____

CURRENT BOAT INFORMATION:

POWER ____ SAIL ____ LOA (Tip-to-Tip) ____ DRAFT ____

NO BOAT BUT PLAN TO GET: POWER ____ SAIL X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' __ 90' ✓

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: ____

Jason Holloway
Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

#75.00 CHECK 02/27/12

Mayor Gavin Newsom
General Manager Phillip A. Ginsburg

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL: 415.931.2333 FAX: 415.292.2015 WEB: www.sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): PAUL (Last): REYFF

MAILING ADDRESS: [redacted] (APT NO.) ____

(CITY) [redacted] (STATE) CA (ZIP) [redacted]

TELEPHONE: (HOME) [redacted] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION:

POWER: X SAIL: ____ LOA (Tip-to-Tip) 30' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER: ____ SAIL: ____

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' __ 30' __ 35' __ 40' __ 45' __ 50' __ 60' __ 80' __ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: X

Renewal: ____

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

#75.00 CHECK 3/1/12

Mayor Gavin Newsom
General Manager Phillip A. Ginsburg

Edwin M. Lee, Mayor
Phillip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olive Gang, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Malonchi v. Recreation and Park Department
Complaint # 12058

We write in response to the complaint Dominic Malonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Malonchi alleges that RPD violated (1)"Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24l." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Malonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article I, Section 1 of the California Constitution.

I. RPD Complied With Malonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(I); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Malonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Malonchi asked for "copies of the contracts for all people on the 90 foot wait list."

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | PHONE: (415) 831-2700 | WEB: sfrecpark.org

RPD responded to Malonchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Malonchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Malonchi.

The Wait List applications Malonchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Malonchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Malonchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Malonchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "(p)rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "(p)ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "(r)elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "(r)ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "(a)ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malonchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Malonchi in response to his public records request.

2. Individuals Have a Substantial Privacy Interest In Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999); see also Lorig v. Med. Bd., 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); Sheet Metal Workers v. Dep't of Veteran Affairs, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." Id. at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Id. at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See Sheet Metal Workers Int'l, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

3. There Is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information Is Unrelated to RPD's Performance of Its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. Braun v. City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "'what the government is up to'"); Local 1274, IL Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); Vaiche v. F.B.I. (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1005 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers or e-mail addresses of retirees and beneficiaries"); Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is/will – served by Malonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." Id. at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also Painting Indus. of Hawaii, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); Local 1274, IL Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); Sheet Metal Workers, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little. If anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance at its duties. To the extent Malonchi or any other citizen is interested in the number and date at Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Malonchi.

III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Malonchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Malonchi are not "contracts." A contract is "(a)n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form -- the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "(t)he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

Olivia Gong

Olive Gong
Custodian of Records

Attachments: Exhibit A

Ausberry, Andrea

From: dm567@pacbell.net
Sent: Tuesday, July 16, 2013 6:20 PM
To: Ginsburg, Phil
Cc: SOTF
Subject: Fwd: SOTF - NOTICE of Hearing - CAC July 16, 2013

Dear Mr. Ginsburg,

I attended the below mentioned hearing today. The committee voted unanimously today that it go back to the full board with a recommendation for this matter to go to the ethics commission.

I have previously informed you of your department's decision not to comply with the Order of Determination of the Sunshine Task Force. I hope that open government is important to you and ask that you order your department to release the documents without redactions. As the head of the Recreation and Park Department the authority and responsibility rests directly with you.

Regards,

dominic maiocchi
dm567@pacbell.net

Begin forwarded message:

From: SOTF <sotf@sfgov.org>
Subject: SOTF - NOTICE of Hearing - CAC July 16, 2013
Date: July 10, 2013 12:53:12 PM PDT
To: "Gong, Olive" <olive.gong@sfgov.org>, "dm567@pacbell.net" <dm567@pacbell.net>
Cc: "Grant, Kitt (sunshinechairgrant@gmail.com)" <sunshinechairgrant@gmail.com>, "Knee, Richard (rak0408@earthlink.net)" <rak0408@earthlink.net>, "Washburn, Allyson (amwashburn@comcast.net)" <amwashburn@comcast.net>

Good Afternoon,

This is notice that your complaint has been scheduled with the Compliance and Amendments Committee, of the Sunshine Ordinance Task Force regarding the following filed complaint, to review the status of and ascertain compliance with the Task Force's Order of Determination.

1. COMPLAINT No. 12058: Hearing on the status of the Order of Determination of Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

Date: July 16, 2013
Location: City Hall, Room 408
Time: 4:00 p.m.

Complainant: Your attendance is required at this meeting/hearing. Please notify the Office of the Sunshine Ordinance Task Force if you are not able to attend.

Respondent/Department: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

For inclusion of the agenda packet, supplemental/supporting documents must be received by 12:00 pm, July 12, 2013.

Kind regards,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415.554.7724 | Fax 415.554.5163
sotf@sfgov.org | www.sfhos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
Follow Us! | Twitter

Complete a Board of Supervisors Customer Service Satisfaction form by clicking HERE.

Ausberry, Andrea

From: dm587@pacbell.net
Sent: Tuesday, June 04, 2013 8:26 AM
To: SOTF
Subject: Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Andrea,

Rec and Park is refusing to provide the documents. They tell me I already received them. How do I get this case assigned to a committee of the task force for enforcement follow up?

I am now officially filing a second complaint with the task force for the same documents. Put me on the docket.

Dom

dominic maionchi
dm587@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

Ausberry, Andrea

From: dm567@pacbell.net
Sent: Tuesday, June 04, 2013 4:07 PM
To: Gong, Olive
Cc: SOTF
Subject: Re: Response to your sunshine request

Dear Olive,

Are the powers that be aware that the Sunshine Task Force Ruled that the documents should not be redacted in their ruling?

Is your department refusing to abide by their ruling?

Regards,

dominic maionchi
dm567@pacbell.net

This message contains coonfideotial information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or cootain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is raquired please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

On Jun 4, 2013, at 4:01 PM, "Gong, Olive" <olive.gong@sfgov.org> wrote:

HI Dominic,

We have received the documents requested in your request dated 5-31-2013, received Monday, 6-3-2013 (and copied below) and will send them to you as soon as they have been reviewed and by the deadline of 6-13-2013, though I expect to have them ready by tomorrow.

In your new request, dated 6-4-2013, you asked to see original documents, however, as mentioned previously, we do not release waiting information without redacting personal information first.

Let me know if you have any further questions,
Olive

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

Please consider the environment before printing this e-mail

From: dm567@pacbell.net [mailto:dm567@pacbell.net]
Sent: Friday, May 31, 2013 8:41 PM
To: Gong, Olive
Subject: Re: sunshine request

Dear Olive,

This email is meant for you.

This is a NEW Sunshine request in addition to my sunshine request on May 29th.

Please send me the wait list applications (contracts) for the 90 foot wait list as they are in the records as of today. There may have been changes to them since the last time I received them? Please don't tell me that there have been no changes. I would like to see copies of them as they sit in the files today.

Dom

dominic maionchi
dm567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

TO: Sunshine Task Force

FROM: Dominic Malonchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MALONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:
1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24l

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

SOTF

From: dm567@pacbell.net
Sent: Saturday, January 26, 2013 8:40 AM
To: SOTF
Cc: Gong, Olive
Subject: Fwd: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept
Attachments: Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf, Exhibit A.pdf

Dear Andrea,

I have not heard back. I informed you that the documents did not complete my request. See below. Have you scheduled a hearing date yet?

Thank you,

dom

dominic maionchi
dm567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>
Subject: **Re: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept**
Date: December 21, 2012 10:35:30 AM PST
To: SOTF <sotf@sfgov.org>

Dear Honorable Members, Sunshine Ordinance Task Force,

The provided documents do not complete my request. Please schedule a hearing date.

The documents provided do not
dominic maionchi
dm567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

On Dec 20, 2012, at 6:38 PM, SOTF <sotf@sfgov.org> wrote:

Good Afternoon,

The SOTF Office is in receipt of a response from the Recreation and Park Department ,regarding your above mentioned complaint case.

The Respondent was notified of your complaint, in an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force. The following email and attached documents are the Respondent's response/records you requested.

The SOTF Office will consider your case to be resolved. Unless you respond to whether the documents the Respondent has provided completes your request.

Thank you,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415.554.7724 |Fax 415.554.5163

sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
Follow Us! | Twitter

Complete a Board of Supervisors Customer Service Satisfaction form by clicking SFGF

From: Gong, Olive
Sent: Wednesday, December 19, 2012 3:18 PM
To: SOTF
Cc: Ausberry, Andrea; McArthur, Margaret
Subject: Response to SOTF Complaint 12058 - Dominic Malonchi v Rec and Park Dept

Dear SOTF,

Please see attached response to Complaint # 12058 - Dominic Malonchi v Rec and Park Dept.

Olive Gong
San Francisco Recreation and Park Department | City & County of San Francisco
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | olive.gong@sfgov.org

Visit us at sfrecpark.org
Like us on Facebook
Follow us on Twitter
Watch us on sfRecParkTV
Sign up for our e-News

Reduce, Reuse, Recycle

Edwin M. Lee, Mayor
Philip A. Ginsburg, General Manager

To: *Honorable Members, Sunshine Ordinance Task Force*

From: *Olive Gong, Custodian of Records, Recreation and Park Department*

Date: *December 19, 2012*

Subject: *Dominic Malonchi v. Recreation and Park Department*
Complaint # 12058

We write in response to the complaint Dominic Malonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complain, Malonchi alleges that RPD violated (1)"Section 67.21b by not complying in 10 days with the request." (2) "Section 67.24e1," and (3) "Section 67.24i." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Malonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article I, Section 1 of the California Constitution.

I. *RPD Complied With Malonchi's Request Within 10 Days As Required by Section 67.21(b).*

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form: corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(b)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(i); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Malonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Malonchi asked for "copies of the contracts for all people on the 90 foot wait list."

RPD responded to Malonchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Malonchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Malonchi.

The Wait List applications Malonchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Malonchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Malonchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Malonchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "(p)rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "(p)ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "(t)elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "(r)ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "(a)ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malonchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Malonchi in response to his public records request.

2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999); see also Lorig v. Med. Bd., 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); Sheet Metal Workers v. Dep't of Veteran Affairs, 135 F.3d 691, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of (unsolicited) union-related mail ... telephone calls or visits, that would follow disclosure." Id., at 498. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Id. at p. 500–501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See Sheet Metal Workers Int'l, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

3. There Is No Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information Is Unrelated to RPD's Performance of Its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. Braun v.

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a birth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ["privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"]; Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1994) 26 F.3d 1479, 1486 [no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "'what the government is up to'"]; Local 1274, Ill. Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 [names and addresses of school district parents had "nothing to do with the duties of any public servant"]; Voinche v. F.B.I. (D.D.C. 1996) 940 F. Supp. 323, 330 [workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials]. Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1006 (2011) [while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"]; Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) [while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers"].

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Malonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[if is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by retraining from the arbitrary exercise of official power." Id. at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also Painting Indus. of Hawaii, 26 F.3d at 1486 ["employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"]; Local 1274, Ill. Fed. of Teachers, 287 Ill. App. 3d at 193 [names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"]; Sheet Metal Workers, 135 F.3d at 903 ["The release of names, addresses, and similar 'private' information reveals little. If anything, about the operations of the Department of Veterans Affairs."]

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Malonchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Malonchi.

III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Malonchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Malonchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15-days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of the information on the Wait List application form – the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants must often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

Olive Gong
Custodian of Records

Attachments: Exhibit A

Edwin M. Lee, Mayor
Dennis J. Herrera, City Attorney

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

NANCY S. MUELLER

NANCY MUELLER
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: --

Berth Size: 90'

Please review this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, current contact information and a non-refundable Seventy-Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (expires June 30th, 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my choice of berth on the Waiting List may be cancelled.

Renewal: X [signature] NANCY S. MUELLER

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please review completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00
Check #1413
11/9/11

Edwin M. Lee, Mayor
Dennis J. Herrera, City Attorney

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

November 2, 2011

Nell Phinn

Nell Phinn
[redacted]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted]
Other: 510-864-0155

Berth Size: 90'

Please review this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, current contact information and a non-refundable Seventy-Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (expires June 30th, 2012).

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Renewal: X [signature]

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please review completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

$75.00
Ck

11 NOV 22 AM 8:25

Edward H. Lee, Mayor
Philip A. Ginsburg, General Manager

SAN FRANCISCO MARINA
WAITLIST RENEWAL APPLICATION
2011/2012 (1 YEAR)

November 2, 2011

Dear Slip#:

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina waiting list application.

Name:
Office: 916-375-2721

Berth Size: 30

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment in the hands and of business on Wednesday November 16th, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal! X _____
Signature of Applicant

Please make check payable to: San Francisco Marina

Please return completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

Pictures Today in Scott's Slip #1 | 3950 Scott Street | San Francisco CA 94123 | Phone: (415) 931-2700 | Web: sfmarina.org

214

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
3950 Scott Street, San Francisco, CA 94123
TEL: 415.931.2628 FAX: 415.292.6448 web: sfmarina.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 2-23-11

APPLICANT NAME (First): John (Last): Hill

MAILING ADDRESS: [redacted] (APT NO.:)

(CITY): [redacted] (STATE): CA (ZIP): [redacted]

TELEPHONE NUMBER: [redacted] (WORK): ( )

CURRENT BOAT INFORMATION:

POWER: SAIL: LOA (ft): 30 DRAFT:

NO BOAT BUT PLAN TO GET: POWER: SAIL:

BERTH SIZE REQUESTED (Please check the size only. Additional requests require additional application)

25' 30' 35' 40' 45' 50' 60' 70'

I hereby request that my name be placed on the list maintained at the San Francisco Marina Small Craft Harbor. I understand that the non-refundable fee of seventy five dollars ($75.00) must be received by my name may be removed from the list. I understand that if I am offered a berth and do not accept it, or if I am not offered a berth by the end of the fiscal year (June 30th) and do not renew my application for the following year, my name will be removed from the list. I understand that I may be removed from the Wait List if I provide false information on this application form or fail to respond to me regarding offers I may receive, or changes in my application information.

New Application: ✓

Renewal:

Signature of Applicant

Please make check payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

$75.00 CK#1015 04/01/12

Pictures Today in Scott's Slip #1

215

City and County of San Francisco
Recreation and Park Department

San Francisco Yacht Harbor
Marina Small Craft Harbor
3950 Scott Street, San Francisco, CA 94123
tel. 415.921.5192 fax. 415.292.0314 web: sfrecpark.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR $75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): PAUL (Last): Boyce

MAILING ADDRESS: [redacted] (APT NO.): ____

CITY: [redacted] (STATE): CA (ZIP): [redacted]

TELEPHONE NUMBER: [redacted] (WORK): (415) 360-9955

CURRENT BOAT INFORMATION:

POWER: NO SAIL: ____ LOA (Tip-to-Tip): 90 DRAFT: 6.5'

NO BOAT BUT PLAN TO GET: POWER: ____ SAIL: ____

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application):

25' ___ 30' ___ 35' ___ 40' ___ 45' ___ 50' ___ 60' ___ 80' ___ 90' X

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable $75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes to my contact information.

New Application: NO

Renewal: ____

Signature of Applicant

Please make checks payable to: San Francisco Marina

Please return completed form to: San Francisco Marina Wait List
3950 Scott St.
San Francisco, CA 94123

3/1/12

Mayor Edwin M. Lee
Rec & Park Commission: Gilmore, Chinchilla, Harrison, Kellum, Lee, Mazzola, Torres

TO: Sunshine Task Force

FROM: Dominic Maionchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:

1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24i

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

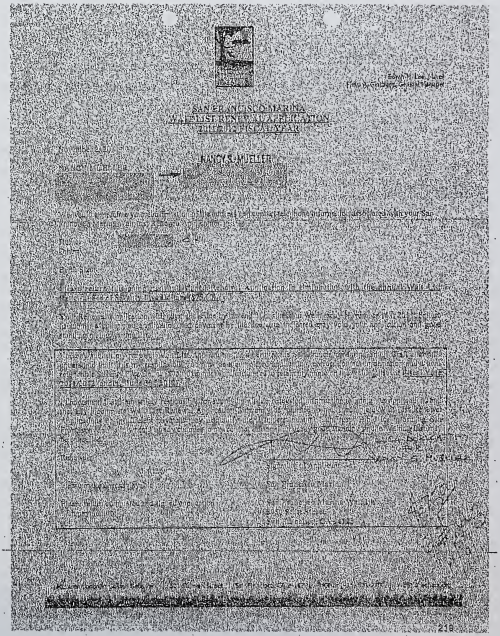
RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

becomes available. If RPD did not provide a slip when available, the wait list applicant could enforce the agreement against RPD. Furthermore, there is consideration for this agreement in the form of a fee that has been approved by the controller's office. Simply pretending that this is not a contract does not make it something else.

RPD continues to argue that even if it is a contract that there is nothing in the sunshine ordinance that compels the city to disclose private residences that may be listed in the contract. RPD is again mistaken. First, the ordinance clearly states that contracts "shall be open for inspection immediately." The ordinance does not differentiate between contracts between businesses or individuals. Furthermore, a careful reading of the ordinance tells one that one should err on the side of disclosing information rather than not disclosing information. According to section 67.27 withholding is to be kept to a minimum. Furthermore, there is no exempt information on the wait list agreement under the California Public Records Act.

The un-redacted berthing agreements between the RPD and individuals were deemed by the Sunshine Task Force to be available under the Sunshine Ordinance to me on July 28, 2009. (Case 09032) The wait list agreements are no different and should also be made available to me un-redacted also. I would like the addresses so that I can inform the wait list applicants by mail to their contact address of transactions entered into by RPD that may have violated their right to a slip. In my opinion, that is why we have a Sunshine Ordinance in the first place; we need to keep everyone honest.

Regards,



SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

September 9, 2011

Dear Applicant:

We would appreciate your confirmation of the address and contact telephone information as shown below. Please write in changes as applicable.

Phone: [redacted]
Email: [redacted]

Berth Size: 30'

Please return this completed and signed Renewal Application in combination with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011, failure to submit a complete application and payment by the due date indicated may void your application and place you at the bottom of the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee in order to stay current on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for submitting all the requested information, signing the application, and that any incomplete Wait List Renewal Application may not be reviewed timely, be rejected Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any change in my contact information or vessel ownership while I am on the waiting list.

Signature: X

Signature of Applicant

Please mail check payable to: San Francisco Marina

Please submit completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

All correspondence should be sent to: 3950 Scott Street · San Francisco, CA 94123 · Phone: (415) 831-6750 · Fax: (415) 346-2420

SAN FRANCISCO MARINA
WAIT LIST RENEWAL APPLICATION
2011/2012 FISCAL YEAR

September 9, 2011

Dear Applicant:

We would appreciate your confirmation of the address and contact telephone information as shown below. Please write in changes as applicable.

Phone: [redacted]
Email: [redacted]

Berth Size: 30'

Please return this completed and signed Renewal Application in combination with the annual Wait List Renewal Fee of Seventy Five Dollars ($75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16th, 2011, failure to submit a complete application and payment by the due date indicated may void your application and place you at the bottom of the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar ($75.00) annual application fee in order to stay current on the waiting list for Fiscal Year 2011/2012 (ending June 30th 2012).

I understand that I am solely responsible for submitting all the requested information, signing the application, and that any incomplete Wait List Renewal Application may not be reviewed timely, be rejected Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any change in my contact information or vessel ownership while I am on the waiting list.

Signature: X

Signature of Applicant

Please mail check payable to: San Francisco Marina

Please submit completed and signed application with payment to: San Francisco Marina Wait List
3950 Scott Street
San Francisco, CA 94123

#250
Check
10/07
10/11

All correspondence should be sent to: 3950 Scott Street · San Francisco, CA 94123 · Phone: (415) 831-6750 · Fax: (415) 346-2420

Rivka M. Lee, Mayor
Philip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olive Gong, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Malonchi v. Recreation and Park Department
Complaint # 12058

We write in response to the complaint Dominic Malonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Malonchi alleges that RPD violated (1)"Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24f." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Malonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Malonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(B); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Malonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Malonchi asked for "copies of the contracts for all people on the 90 foot wait list."

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA 94117 | Phone: (415) 831-2700 | Web: sfrecpark.org

RPD responded to Malonchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Malonchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Malonchi.

The Wait List applications Malonchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Malonchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Malonchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Malonchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malonchf for any other member of the public] the personal information RPD redacted from the Wait List applications provided to Malonchf in response to his public records request.

2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999); see also Lado v. Mesa Sch., 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); Sweet Metal Workers v. Dep't of Veterans Affairs, 135 F.3d 691, 694 (3d Cir. 1998) (workers hired to help renovate a Veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 498-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels section 6254(c). The privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits that would follow disclosure." Id. at 496. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." Id. at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See Sweet Metal Workers Int'l, 135 F.3d at 705 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Dep't of Defense, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private characterin the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing the information to RPD -- as required by RPD -- they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

3. There is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because that Information is Unrelated to RPD's Performance of its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. Beauty v.

City of Taft, 154 Cal. App. 3d 832, 845 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait list applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1990) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in undovering "what the government is up to."); Lorig 1276 E. Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); Voinche v. F.B.I. (D.D.C. 1995) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identities of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 335 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest -- which, so far as we can tell, is nil -- served by Malonchf's request of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its duty[]." 74 Cal. App. 4th at 1018. Nor is disclosure of applicants' personal contact information necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." Id. at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also, Painting Indus. of Hawaii, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); Lorig 1276 E. Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); Sheet Metal Workers, 135 F.3d at 705 ("the release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful, while "[a individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers. There is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Malanchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and for the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Malanchi.

III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Malanchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Malanchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of the information on the Wait List application form -- the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of the private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that this Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

Olivia Gong

Olive Gong
Custodian of Records

Attachments: Exhibit A

Ausberry, Andrea

From: Ausberry, Andrea
Sent: Wednesday, December 12, 2012 3:16 PM
To: Gong, Olive; 'dm507@pacbell.net'
Cc: 'Jerry.Threet@sfgov.org'; Giuni, Kit (sunshinechairgrant@gmail.com)
Subject: Mediation - SOTF Complaint 12058
Attachments: 12058 Complaint.pdf

Good Afternoon,

This e-mail is notification that the following complaint has been received from Dominic Maiocchi against the Recreation and Park Department. In an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force, please respond to the following request within five business days.

The Complainant is requesting: PLEASE SEE ATTACHED REQUEST

Pursuant to Section 67.21(b), If the custodian of public records believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of the Sunshine Ordinance.

Thank you,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415.554.7724 | Fax 415-554-5163
sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
Follow Us!| Twitter

Complete a Board of Supervisors Customer Service Satisfaction form by clicking[HERE]

SOTF

From: SOTF
Sent: Wednesday, January 30, 2013 8:43 AM
To: 'dm507@pacbell.net'; Gong, Olive
Cc: Threet, Jerry; Kit grant; 'sotfmbrSOTF@gmail.com'
Subject: Sunshine Complaint Received: Case No. 12058 Dominic Maiocchi v Recreation and Park
Attachments: 1_Complaint Procedures_4-26-09 _Final.pdf; 12058 Complaint.pdf; 12058 Respondents response.pdf; 12058 Respondents Response Exhibit A.pdf

Good Afternoon,

This e-mail is to confirm that the attached/following complaint and support document(s) was received and went through the mediation process without resolve and will proceed to be heard by the Sunshine Ordinance Task Force. If the Respondent did not submit a written response during mediation, please do so as it is required to submit a written response to the allegations including any and all supporting documents, recordings, electronic media, etc., to the Task Force within five (5) business days of receipt of this notice. This is your opportunity to provide a full explanation with enough advance time so that the Task Force may be fully informed in considering your response prior to the meeting. Please refer to Complaint No. 12058 when submitting any new information and/or supporting documents pertaining to this complaint.

The Sunshine Ordinance Task Force was suspended during the months of June 6, 2012 through November 6, 2012 from hearing complaints, due to it being constituted in violation of Section 67.30 of the Ordinance: "At all times the Task Force shall include at least one member who shall be a member of the public who is physically handicapped and who has demonstrated interest in citizen access and participation in local government."

Therefore, due to the backlog and complaints heard according to chronological submission both parties (Complainant and Respondent) will be contacted once a hearing date is determined.

Complainants: Your attendance is required at this meeting/hearing.

Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, attendance by the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

Also, attached is the Sunshine Ordinance Task Force's complaint procedures.

Thank you,

Andrea S. Ausberry
Administrator
Sunshine Ordinance Task Force
Office 415.554.7724 | Fax 415-554-5163
sotf@sfgov.org | www.sfbos.org
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102
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Complete a Board of Supervisors Customer Service Satisfaction form by clicking HERE

Ethics Commission Complaint No. 10-150331

Exhibit B

SUNSHINE ORDINANCE
TASK FORCE

City Hall
1 Dr. Carlton B. Goodlett Place Room 244
San Francisco CA 94102-4689
Tel. No. (415) 554-7724
Fax No. (415) 554-7854
TDD/TTY No. (415) 554-5227

John St. Croix, Executive Director
Ethics Commission
25 Van Ness Ave Ste 220
San Francisco CA 94102

BY
SAN FRANCISCO
ETHICS COMMISSION
2015 MAR 31 PM 12:10
FILED

March 30, 2015

Re: Referral to the Ethics Commission – Dominic Maionchi (Complainant) v. Phil Ginsburg, General Manager, Recreation and Park Department (Respondent), for failure to provide Un-redacted copies of records pertaining to waiting lists for slips in the Marina Yacht Harbor. (Task Force File No. 12058)

Dear Executive Director St. Croix,

The Task Force previously referred this matter to the Ethics Commission (Commission) for enforcement by letter dated March 3, 2014. The Commission heard the matter at its April 28, 2014 meeting and referred the matter back to the Task Force "for further factual information."

By way of background, the Task Force heard the complaint on May 1, 2013. The Complainant alleged that the Recreation and Park Department (Department) violated public records laws by failing to timely respond to his November 22, 2012 public records request and failing to provide un-redacted copies of the requested records pertaining to waiting lists for slips in the Marina Yacht Harbor. The Complainant appeared before the Task Force and presented his claim. Olive Gong, Custodian of Records for the Department, presented the Department's defense. The issue in this case was whether the Department violated Sunshine Ordinance sections 67.21 and 67.24 and / or California Public Records Act section 6253.

The Task Force found the testimony of the Complainant persuasive and that Sunshine Ordinance section 67.26 was applicable in this case. The Task Force did not find the testimony of the Department persuasive regarding the alleged violation of Sunshine Ordinance section 67.26. An Order of Determination was issued on June 12, 2013.

The Complainant provided an update at the July 16, 2013 Compliance and Amendments Committee meeting. The Complainant stated that the Department had provided the same documents as had been provided in response to the original records request, which does not comply with the Order of Determination. Olive Gong of the Department stated that the California Government Code supports the Department's decision to redact the documents provided to the Complainant and not disclose others. The committee found noncompliance with the Order of Determination and referred the matter back to the Task Force with recommendation to refer it to the Ethics Commission for enforcement for violating Sunshine Ordinance sections

67.21 (i), 67.26, and 67.34, and for the Chair to draft a letter to the City Attorney stating that the Department's attorney is in violation of Sunshine Ordinance section 67.21 (i).

The Complainant provided an update at the November 6, 2013 Task Force meeting. Olive Gong of the Department presented the Department's defense and stated that the Department is not in violation according to their interpretation and policy not to disclose addresses. The Task Force found the Department in violation of the Sunshine Ordinance as determined in the Order of Determination (sections 67.21 (e), 67.24 (g), and 67.34) and referred the matter to the Ethics Commission for enforcement, specifically naming Phil Ginsburg, General Manager, Recreation and Park Department, responsible.

As stated above, the Task Force referred the matter to the Ethics Commission for enforcement by letter dated March 3, 2014. The Commission heard the matter at its April 28, 2014 meeting and referred the matter back to the Task Force "for further factual information."

The Task Force heard the matter subsequently on September 3, October 1, and November 5, 2014. At the September 3, 2014 meeting the Task Force decided not to hear the matter again on the merits but to consider a new motion to again refer the matter to the Ethics Commission for enforcement with additional factual information as requested. In particular, the attached Findings are intended to provide additional detail to support the Task Force's referral for enforcement. Further, to avoid unnecessary duplication, only new material (agendas, minutes, and other documents) since the Task Force's March 3, 2014 referral is attached here.

It should be noted the Phil Ginsburg, General Manager, Recreation and Park Department, was aware of the proceedings before the Sunshine Ordinance Task Force and that notice of hearings were copied/provided to Mr. Ginsburg regarding the following:

September 23, 2013 - Notice for the October 2, 2013, SOTF meeting transmitted.
September 26, 2013 - Reminder to Ms. Gong requesting that Mr. Ginsburg appear at the October 2, 2013, SOTF meeting.
October 2, 2013 - Meeting continued to October 24, 2013 at the request of both parties.
October 24, 2013 - Notice for the November 6, 2013 SOTF meeting transmitted.
March 3, 2014 - Copy of the SOTF November 6, 2013, referral to the Ethics Commission.

The motion to refer this matter to the Ethics Commission for enforcement was passed at the November 6, 2013, meeting of the Sunshine Ordinance Task Force by the following vote:

Ayes: 8 – Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Absent: 1 – David

The motion to refer this matter back to the Ethics Commission was passed at the December 3, 2014, meeting of the Sunshine Ordinance Task Force by the following vote:

Ayes: 7 - Rumold, Wolf, Chopra, Hepner, David, Fischer, Washburn
Noes: 0 - None
Absent: 4 - Winston, Pilpel, Hinze, Hyland

This referral is made pursuant to Sunshine Ordinance section 67.30 (c), which provides that "the Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this ordinance or the Acts."

In this case, the Task Force finds Phil Ginsburg, General Manager, Recreation and Park Department, in violation of Sunshine Ordinance section 67.26 and further finds the violation a **willful failure** of the department head to discharge his duties under the Sunshine Ordinance pursuant to Sunshine Ordinance section 67.34. Just as the Ethics Commission found John Rahaim, Director, Planning Department, responsible for actions in File No. 13024 on July 28, 2014 we believe that Mr. Ginsburg is responsible here and should be similarly held accountable.

Thank you for your attention to this matter. Documents described above related to this matter are attached along with the Order of Determination. You may contact Task Force Administrator Victor Young at sotf@sfgov.org or (415) 554-7724 with any questions.

Sincerely,

Allyson Washburn
Chair, Sunshine Ordinance Task Force

Enclosures

c: Sunshine Ordinance Task Force Members
Nicholas Colla, Deputy City Attorney
Dominic Maionchi, Complainant
Olive Gong, Custodian of Records, Recreation and Park Department
Phil Ginsburg, General Manager, Recreation and Park Department

SUNSHINE ORDINANCE
TASK FORCE

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Findings in the Matter of Dominic Maionchi (Complainant) v. Phil Ginsburg, General Manager, Recreation and Park Department (Respondent), for failure to provide unredacted copies of records pertaining to waiting lists for slips in the Marina Yacht Harbor (Task Force File No. 12058)

SUMMARY: In this matter, Dominic Maionchi (Complainant) is seeking unredacted copies of waiting list applications for certain boat slips in the Marina Yacht Harbor operated by the Recreation and Park Department (Department). The Complainant submitted a request for the subject public records on November 22, 2012. The Department responded on December 3, 2012 and provided copies of the records sought, redacting personal contact information (addresses and telephones numbers). The Complainant was not satisfied with the redacted records and filed a complaint / petition with the Sunshine Ordinance Task Force (Task Force) on December 12, 2012 seeking the unredacted records.

The Task Force heard the matter on May 1, 2013, determined that the Department should have provided unredacted copies of the requested records, ordered the Department to do so within 5 days, and scheduled a follow-up committee hearing for July 16, 2013. The Task Force Order was issued on June 12, 2013. At the July 16, 2013 committee hearing Olive Gong, the Department's representative, indicated that the Department would not comply with the Task Force's Order and would continue to withhold unredacted copies of the subject records, citing advice from its Deputy City Attorney, Francesca Gessner of the Government Team, and its own internal but unwritten department policy. The committee referred the matter back to the full Task Force for further consideration. At its August 7, 2013 meeting the Task Force heard from both parties, discussed the matter again, and continued it to the September 4, 2013 meeting to prepare this referral document with written findings.

BACKGROUND FACTS: The Department operates a Marina Yacht Harbor containing boat slips pursuant to Rules and Regulations (Rules) adopted by the Recreation and Park Commission. The Rules were last amended in 2012 following a public hearing and some apparent disagreement over application and interpretation of the previous Rules. The Task Force was informed that the Department considers Rental Agreements for boat slips to be contracts and does not redact personal contact information when disclosing copies of such Rental Agreements, but considers waiting list applications not to be contracts and thus does redact personal contact information when disclosing copies of such waiting list applications. Further, the Department charges a fee for renting space under a Rental Agreement and also charges a fee to get on and stay on the waiting list. The Complainant stated at the May 1, 2013 Task Force hearing that his belief is that the Department did not properly follow the waiting list and allowed at least one person on the waiting list below to obtain a boat slip ahead of those higher up on the waiting list. The Complainant stated that in order to pursue his allegation he needed the personal contact information of those people on the waiting list so that he might contact them to discuss matters.

ANALYSIS: It appears that there are 5 pages at issue; i.e. 5 people on the waiting list in question. The Complainant is not contesting timeliness of response and the parties appear to be in agreement as to the facts. The dispute appears to turn on whether the privacy interests in nondisclosure of personal contact information of the waiting list applicants outweigh the public interest in disclosure of that information under these specific facts and circumstances. Based on the Complainant's statements, he appears to be pursuing a matter of public interest, i.e. whether the Department is following its own Rules and offering boat slips to those people on the waiting list in strict order as such slips become available. This would appear to shed light on government operations and not likely result in personal gain on the part of the Complainant, an unwarranted invasion of privacy of people on the waiting list, or some other inappropriate result.

Since successful applicants on the waiting list will obtain a boat slip under a Rental Agreement with the Department, by which time the Department acknowledges that their personal contact information will become public, the privacy interest of the waiting list applicants is at best temporary. Indeed, the only reason that their personal contact information might not be available is that a boat slip was not immediately available, thus requiring the waiting list process itself. The Good Government Guide maintained by the City Attorney's office, in its most recent (2010-11) edition, states that "Ordinarily, the City will not disclose personal contact information in response to a public records request, as such information does not generally shed light on the operations of government." This advice is not absolute, but provides a rebuttable presumption as to whether such personal contact information may be disclosed.

CONCLUSION: Under the specific facts and circumstances in this matter, the Department should have provided unredacted copies of the requested records in its initial response to the request, following the Task Force's determination, or at least prior to this referral. Instead, the Department continues to assert that it will not disclose personal contact information on records of this type. The Task Force, however, finds that the information is being sought to shed light on the operations of government, thus defeating the presumption not to disclose. In this case the Task Force finds that the public interest in disclosure outweighs the privacy interest of those persons on the waiting list and that their personal contact information should be provided to the Complainant. Phil Ginsburg, the General Manager of the Department, is ultimately responsible for the decision not to disclose the requested information. Given conflicting advice from the City Attorney and the Task Force, the decision not to disclose might not ordinarily be considered a willful failure to act under the Sunshine Ordinance but merely a failure to act according to, and a violation of, the Ordinance. However, given the prolonged nature of this case and the Department's unwillingness to consider disclosure or any other alternative to nondisclosure the Task Force further finds the violation on Mr. Ginsburg's part to be willful in nature.

A motion to adopt these Findings was passed at the November 6 2013, meeting of the Sunshine Ordinance Task Force by the following vote:

Ayes: 8 – Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant
Absent: 1 – David

Ethics Commission Complaint No. 10-150331

Exhibit C

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

BURK E. DELVENTHAL
Deputy City Attorney

DIRECT DIAL: (415) 554-4650
E-MAIL: buck.delventhal@sfgov.org

TO: Honorable Members,
Sunshine Ordinance Task Force

FROM: BURK E. DELVENTHAL
Deputy City Attorney

DATE: September 24, 2014

RE: Open Government and Personal Privacy
Complaint No. 12058

Introduction and Issue Presented

Consistent with the general rule we outline in our Good Government Guide, [1] this memorandum is to describe the City Attorney Office's long-standing advice to City departments and officials regarding the underlying public records question raised by Dominic Maionchi's December 12, 2012 complaint against the San Francisco Recreation and Park Department ("RPD") (Complaint No. 12058): must RPD withhold from public disclosure the home addresses and personal telephone numbers of five private individuals who are on a waiting list for a berth at the San Francisco Marina Small Craft Harbor in order to protect their privacy rights? We understand that consideration of Mr. Maionchi's complaint by the Sunshine Ordinance Task Force ("SOTF") and the Ethics Commission (Complaint No. 03-140303) has raised a number of procedural questions. We address here only the key substantive legal question: When a private citizen includes a home address or personal (home or cellular) telephone number on an application or registration form the City requires for the individual to attend or participate in a City program, activity, or service, use a City facility, or receive a City benefit, is that home address or personal telephone number subject to disclosure under the Public Records Act?

Summary

The records of City departments contain hundreds of thousands of home addresses and personal telephone numbers. Private individuals provide this information to the City for limited purposes related to their interest in City services, programs and facilities. This case presents a typical example. This case, involving applications to use a berth in a City marina, is no different from many other cases, such as applications to use a picnic area in a City park or register a child for summer camp, applications to adopt a pet from the City animal shelter, or reports of articles left behind on a Muni bus. In each case (and many other examples that could be cited), private

[1] The City Attorney's Office recently updated our Good Government Guide ("GGG"). Part Three, Section III.D.2 (attached as Exhibit A) discusses exemptions from disclosure authorized by the California Public Records Act and the San Francisco Sunshine Ordinance based on the privacy interests of third parties. The Good Government Guide was cited in several discussions of Mr. Maonchi's complaint. The update does not change our longstanding advice applicable here. We provide the updated text only to avoid confusion. The full text of the updated Good Government Guide can be found at:
http://www.sfcityattorney.org/modules/showdocument.aspx?documentid=1735).

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Individuals provide their home address and personal telephone number to the City for a limited purpose and typically believe that the City will use it solely for that limited purpose. Absent special circumstances, such as a service or benefit for which home address is relevant to eligibility,[2] or where the City makes clear to an applicant ahead of time that a home address and personal telephone number will be a public record, privacy protections of California law prohibit the City from disclosing to a public requester either the home address or personal telephone number of an individual who submits contact information to the City for a particular purpose.

Background

The records request at issue sought "*copies of the contracts for all people on the 90 foot wait list.*" RPD responded by providing five documents, one for each of the 5 persons on the waiting list: three entitled "Wait List Renewal Application; 2011/2012 Fiscal Year" and two entitled "Wait List Application." The different titles reflected only updating of the form. RPD redacted from each document the home address and home telephone number of the applicant. (Three forms contained other contact information that RPD *did not* redact and that was thus available to the requester.) RPD's response cited the privacy protections of Article 1, Section 1 of the California Constitution, Section 6254(c) and (k) of the California Government Code and Section 67.1 of the Sunshine Ordinance as authorities supporting redaction of home addresses and telephone numbers. In response to RPD's redaction, Mr. Maionchi filed SOTF Complaint No. 12058.

Legal Analysis

As the California Legislature states, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov. Code §6250. Yet, despite its unquestioned importance, the public interest in access to information about the conduct of the people's business must be reconciled with other values we hold equally dear. Justice Brandeis described "the right to be let alone" as "the right most valued by civilized men." *Olmstead v. United States* (1928) 277 U.S. 438, 478 (Brandeis, J., dissenting). Whatever its precise ranking, there can be no doubt that privacy is among our most fundamental rights, and "the right to be let alone" reaches its zenith in the privacy of the home. As the Supreme Court has affirmed time and again, "the privacy of the home ... is accorded special consideration in our Constitution, laws, and traditions." *U.S. Dept. of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 501, *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

The Public Records Act (PRA), the California Constitution and the San Francisco Sunshine Ordinance all recognize the centrality of privacy to our way of life and, consequently, to the interpretation and application of our open government laws. The Legislature enacted the Public Records Act "mindful of the right of individuals to privacy." Cal. Gov. Code § 6250. Accordingly, one of the basic exemptions in the Act, protects records "the disclosure of which

[2] Even where location is relevant to a City service or benefit, the City may be prohibited from disclosing individual home addresses where an alternative, such as disclosing aggregate data, would serve the public purpose without affecting individual privacy rights. See. e.g., *City of San Jose v. Court of Appeal*, 74 Cal. App. 4th 1008.

would constitute an unwarranted invasion of personal privacy." Cal. Gov. Code § 6254(c). The language of §6254(c) is almost identical to an exemption found in the federal Freedom of Information Act (FOIA) ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). Because the PRA was modeled on FOIA, shares its goals, and often contains similar or identical language, California courts frequently consult decisions construing FOIA when they interpret §6254(c) and other provisions of the PRA. *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.

California voters amended the Constitution in 1972 to expressly protect the right of privacy. Cal. Const., Art. I, § 1. And when the voters again amended the Constitution in 2004 to include the right of access to public records and meetings, they expressly preserved, in full force, the constitutional privacy right and statutory privacy rights: "Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects the right to privacy. . . ." Cal. Const., Art. I, §§ 3(b)(3). See also Cal. Const., Art. 1, §3(b)(5)

As to local law, when San Francisco voters adopted our Sunshine Ordinance in November 1999 with the intent of enhancing public disclosure of City records, they nonetheless acknowledged, "Private entities and individuals. . . have rights to privacy that must be respected." S.F. Admin. Code § 67.1(g). The Voter Information Pamphlet contains assurances from supporters of Proposition G that the enhanced Sunshine Ordinance would not compromise privacy protections. The Proponent's Argument (at 120) states: "Proposition G will not eliminate any state and federal privacy protections for individuals contacting city officials." One Paid Argument (at 128) states: "[Prop G] protects individual privacy and confidentiality." While the Sunshine Ordinance does not contain a specific exemption parallel to §6254(c), it states that "release of documentary public information . . . shall be governed by the California Public Records Act . . . in particulars not addressed by this ordinance. . : ." S.F. Admin. Code §67.21(k).

Finally, the Sunshine Ordinance must be construed in light of a more recent measure the San Francisco voters approved in 2006. Section 12.M.2 of the San Francisco Administrative Code provides: "The City shall not disclose Private Information to any person or entity unless specifically authorized to do so by the subject individual or . . . where required by Federal or State law or judicial order." City policy about disclosure of records raising a privacy concern is thus consistent with policy established by the California Constitution and Public Records Act. There can be no doubt that protection of individual privacy is a central feature of our open government laws.

Mr. Maionchi's complaint to the SOTF presents the question whether home addresses and personal telephone numbers constitute "personnel, medical or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy" under the California Constitution and PRA or "private information" under §12.M.2. Sensitive to the values articulated by Justice Brandeis, both the California and U.S. Supreme Courts have held that home contact information for public employees is entitled to privacy protection. *County of Los Angeles v. L.A. County Employee Relations Commission, et al*, 56 Cal. 4th 905, 927 (2013); *U.S. Department of Defense, et al. v. Federal Labor Relations Authority*, 510 U.S. 487 (1994).

While it is less frequently requested and litigated, home contact information for members of the public cannot be less protected from disclosure than public employee addresses because the central purpose of public disclosure obligations reflected in FOIA, the PRA and the Sunshine Ordinance "is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, *not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.*" *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 774 (1989) (emphasis added). The privacy interest in nondisclosure of home addresses and personal telephone numbers must be balanced against "the only relevant public interest in the FOIA balancing analysis—the extent to which disclosure of the information sought would "she[d] light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to." *U.S. Dept. of Defense, supra* 510 U.S. 487, 497 quoting from *Reporters Comm., supra*, 489 U.S. at 773 (internal quotation marks and emphasis deleted). The purpose of being informed about the activities of public agencies "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.*

There may be a public interest in RPD's administration of the waiting list for berths at the Small Craft Harbor, or its processing of picnic or wedding permit applications, or the SFMTA's system for returning private property left on Muni buses. But we are not aware of any evidence that disclosing the home addresses and personal phone numbers of private individuals in City records related to these activities *would shed any light on such a public interest.* Such disclosure instead sheds light only on where individuals live and how they can be reached by telephone in the privacy of their own homes. Disclosure of home addresses would shed light on a department's performance of its duties only where the City requires address information to determine entitlement to or cost of a public benefit, facility or service. For example, if City law or policy provided that only City residents could reserve a picnic area in a City park, there would be a public interest in ensuring that RPD does not issue permits to non-City residents. But access to Small Craft Harbor berths is not based on residency, zip code, or any other geographic factor; accordingly, disclosing home addresses sheds no light on RPD's administration of the Harbor.

In an April 24, 2013 letter to the SOTF, Mr. Maionchi states, "I would like the addresses so that I can inform the wait list applicants by mail to their contact address of transactions entered into by RPD that may have violated their right to a slip." In other words, Mr. Maionchi wants to provide information to people he believes have a personal interest in administration of an RPD program. But, in a case squarely on point, the Supreme Court has unanimously rejected the argument that a desire to provide individuals with information about a public program is a public purpose that sheds light on the operation of government. Thus, the goal of informing individuals about a public matter does not warrant intrusion into their fundamental right to be left alone in their home. *Bibles v. Oregon Natural Desert Ass'n* (1997) 519 U.S. 355, 355-56.

Conclusion

Because personal contact information for members of the public so rarely serves the only purpose for which its disclosure would be warranted – shedding light on the conduct of

government – the City Attorney's Good Government Guide states as a "general rule" "that departments should not disclose home addresses, personal phone numbers, or personal email addresses of members of the public." GGG, p. 101. Consistent with this general rule, under the circumstances we are aware of regarding this case – which do not materially differ from many other circumstances in which the City collects personal contact information of private individuals who may seek to participate in a City program, activity, or service – RPD was obligated to protect the individuals' privacy by redacting home addresses and personal telephone numbers from documents disclosed to Mr. Maionchi.

B. E. D.

Attachments:

Section III.D.2 of the Good Government Guide

meetings. Admin. Code § 67.28(e). There is no specific dollar limit on the charge for audio copies of audio recorded meetings, but, as with video copies or any other non-paper medium, the charge may not exceed the cost of the medium on which the information is duplicated.

e. Special fees for copies and other services

Although the Sunshine Ordinance generally limits the fee for photocopies of records to 10¢ per page, state or City law may specially authorize certain departments or officials (such as the County Clerk, Assessor-Recorder, and Registrar of Voters) to charge higher fees for photocopies and services such as providing certified copies of documents, or providing copies of certain types of records. These special fees are presumptively valid, but we advise departments and officials to consultfirst with the City Attorney's Office if they have questions regarding such fees.

D. Exemptions from disclosure

The Public Records Act exempts certain classes of records from disclosure. As we discuss later, the Sunshine Ordinance limits the City's ability to claim some of these exemptions. Interpreting these exemptions may present complex legal and factual questions that require consultation with the City Attorney's Office.

Both the Public Records Act and the Sunshine Ordinance create a general right of public access to public records. Therefore, the law always imposes the burden on the City to justify its refusal to disclose a record by specifying the legal basis. Cal. Govt. Code § 6255(b); Admin. Code §§ 67.27(a)-(c).

Some records contain both exempt and non-exempt information. A department may not withhold an entire record unless all the information in it is exempt. Admin. Code § 67.26. Instead, the department must redact the exempted material and annotate the redacted text by referring to the provision or provisions of law authorizing the refusal to disclose. Admin. Code § 67.26. As previously noted, the department may not charge the requester a fee for redacting the information. Admin. Code § 67.26.

Some grounds for nondisclosure commonly arise. Below we discuss some of these. We do not discuss all the exemptions available under State and federal law; many apply only to specialized types of records and some rarely apply.

The exempt status of a record often means that a department may but need not decline to disclose it. But in other instances, such as where State or federal constitutional privacy interests of individuals or a statutory ban is involved, the department must not disclose a record even if it wishes to do so. Departments that have questions about whether they must invoke an exemption, or may choose not to, should consult the City Attorney's Office in advance.

If a department voluntarily discloses a record that it may withhold, then it waives its privilege to withhold the record in the future. Cal. Govt. Code § 6254.5. Departments may not disclose a record to one member of the public and withhold that record from another member of the public. But certain types of disclosures – for example, to another

governmental entity, or if otherwise required by law – do not necessarily require disclosure of that same record to a member of the public. Cal. Govt. Code §§ 6254.5(b), (e). And if the department has inadvertently compromised a third party's rights by disclosing a record it should have withheld, it may not compound the error by making the same wrongful disclosure to another member of the public. For example, if a department has violated a person's privacy by not redacting a home address or home phone number in a record given to a requester, the department may not repeat the error when giving the same record to a second requester.

Individual employees generally lack the authority to waive a privilege to withhold a record. Depending on the circumstances, only the policy body that oversees the department, the department head, or other authorized personnel may make such a decision. Unauthorized disclosure of a privileged record is official misconduct and may subject the person who made the disclosure to disciplinary action or criminal prosecution, or both. Campaign & Govt. Conduct Code §§ 3.228, 3.242.

1. Exemption under state or federal law

The United States Constitution, the California Constitution, and federal or State statutes and regulations exempt from disclosure, or prohibit disclosure of, certain records. The Public Records Act incorporates these laws in an exemption. Cal. Govt. Code § 6254(k). This exemption specifically references the California Evidence Code but is not limited to the various privileges and other provisions there that limit a party's access to information. Rather, under this exemption, where disclosure would violate any federal or State law, the City may not release the record. Where federal or State law does not prohibit disclosure of a record but authorizes nondisclosure, the City may decide whether to disclose.

The Public Records Act catalogues alphabetically many exemptions derived from other State statutes. Cal. Govt. Code §§ 6276.02-6276.48 These are examples of laws that are incorporated into the Act through the exemption referenced above. The list is extensive. For example, it begins with 18 separate listings of information related to AIDS that is confidential under state law, including provisions in the California Penal Code, Health and Safety Code, Insurance Code, and Welfare and Institutions Code. Cal. Govt. Code § 6276.02. But this alphabetical listing is not exhaustive, even as to state statutes, and it does not purport to include references to federal law or to state administrative regulations or state constitutional provisions. Cal. Govt. Code §§ 6275, 6276.

2. Privacy

The California Constitution includes an individual right to privacy. Both state and local law recognize as a general principle that the right to personal privacy sometimes precludes disclosure of public records or information contained in those records. Cal. Govt. Code §§ 6250, 6254(c); Cal. Const., Art. I, §1; Admin. Code §67.1(g); Admin. Code Chapter 12M. These authorities may protect private information or records from disclosure even absent a statutory or constitutional provision addressing the specific information or type of record in question.

Some laws ban disclosure of information based on the privacy interests of individuals. For example, California Welfare and Institutions Code § 10850 makes confidential records that concern individuals who receive certain public social services. In such circumstances, the bar on disclosure is absolute unless the law provides specific exceptions where disclosure is mandated or permitted.

In other circumstances, the privacy bar to disclosure, while not absolute, is still high. In these instances, departments must determine whether disclosure serves a sufficiently significant public purpose to warrant release of the record and the attendant compromise of an individual's privacy. The level of the bar will depend on the nature and strength of the privacy interest. Privacy has many dimensions and cannot neatly be reduced to scientific measurement. Where the privacy interest is relatively weak, a weaker justification for disclosure in the public interest may suffice. But if the justification for public disclosure is itself weak, a relatively weak privacy concern may be sufficient to justify not disclosing the record.

a. Privacy interests of city employees and officials

Departments must not disclose "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Govt. Code § 6254(c). But all personnel records are not automatically exempt. As a general rule:

- Members of the public are entitled to see records that contain a City employee's name, current or past job classification, current or past job assignment, and actual wages earned including overtime. Admin. Code §§ 67.24(c)(3), (4). There may be narrow exceptions to this general rule; for example, in limited circumstances some of this information for certain peace officers possibly may be withheld for safety or security reasons.
- The City must disclose the amount, basis, and recipient of any performance-based increase in compensation or benefits or any other bonus that it awards to any employee. Admin. Code § 67.24(c)(6).
- The City must disclose the job pool characteristics and employment and education histories of all job applicants who accepted employment with the City. Admin. Code §§ 67.24(c)(1), (2).

But, because of the right to privacy, as a general rule the City may not disclose personal information about employees such as home address, telephone numbers, personal e-mail address, age, date of birth, race or ethnicity, sex, and marital status. Disclosure of an employee's social security number is strictly prohibited. Cal. Govt. Code § 6254.29. Further, certain types of personnel records generally may not be disclosed. For example:

- The law generally considers a supervisor's performance evaluation of an employee a private matter that is not subject to disclosure. Even if the evaluation is favorable, it is not generally for public consumption.
- Generally the City must not disclose records containing medical or disability information about employees. Federal and state statutes provide broad protection for such information.

- Peace officer personnel records receive special protection under State law. Cal. Pen. Code §§ 832.7, 832.8. But not all information pertaining to a peace officer qualifies as a "peace officer personnel record." For example, an officer's name and salary is generally not exempt from disclosure. And a department's official incident report in which an officer's name is mentioned is not a peace officer personnel record.

Records concerning discipline of specific City employees, or circumstances that might warrant their discipline, often pose difficult issues. To the extent permitted by law, the Sunshine Ordinance requires the City to disclose records of an employee's confirmed misconduct involving personal dishonesty, misappropriation of public funds, resources, or benefits, unlawful discrimination, abuse of authority, or violence. Admin. Code § 67.24(c)(7). Whether the employee's misconduct is confirmed, and whether it is the type of misconduct addressed by the Ordinance, is sometimes unclear.

The Ordinance does not directly address other issues relating to actual or alleged employee misconduct, such as the treatment of: Unresolved or uninvestigated complaints against employees; complaints that have been investigated and resolved in the employee's favor; and records of ongoing personnel investigations. We recommend that departments faced with requests for such records consult the City Attorney's Office. The privacy issues pertaining to these types of personnel records can be complex, and other considerations in addition to privacy, such as the need to maintain effective investigations and the need to maintain public confidence in City employees and processes, may be relevant.

The law protects the privacy of City officials as well as City employees. For example, the City should not, without a commissioner's consent, disclose to the public that commissioner's personal e-mail address, even if the commissioner has disclosed it to commission staff. But departments should make available a City e-mail address at which members of the public may contact City officials, including commissioners. As another example, the Public Records Act strictly prohibits posting on the internet the home address or phone number of any elected or appointed official, defined broadly to include not merely the Mayor and members of the Board of Supervisors but many others, including active and retired peace officers. Cal. Govt. Code §§ 6254.21, 6254.24. Given the volume of material that many departments now post on their websites, it is important to take care to avoid inadvertently disclosing this type of information.

b. Privacy interests of members of the public

The statutory and constitutional protections for privacy also apply to information in City records about members of the public. For example, social security numbers may not be disclosed to the public. Cal. Govt. Code § 6254.29. To take another obvious example, a patient in a City hospital or health clinic has medical privacy rights that the public records laws cannot override. Similarly, departments may not disclose medical information pertaining to a disability that an individual submits to the City in connection with a request for access to a City building or modification of a City program, unless the individual consents to the disclosure.

Concerns about identity theft warrant redaction not merely of social security numbers, but also of driver's license numbers, credit card numbers, bank account numbers, and similar information in records of transactions between the City and members of the public. This

type of information pertaining to City employees and officials likewise warrants privacy protection. In some circumstances, the law affords greater privacy protection for financial information about private individuals in City records than for comparable information about City employees; but the general rule is that records of distribution of City funds to private persons, like salary payments to City employees, are subject to disclosure.

Although the comparison is not always exact, usually the types of personal information about employees and officials that the City may not disclose will parallel the personal information about members of the public that the City may not disclose. For example, the general rule is that departments should not disclose home addresses, personal phone numbers, or personal e-mail addresses of members of the public. Such personal contact information typically sheds no light on the operations of City government, and thus disclosure does not fulfill the central purpose of public records laws. Further, many individuals would not want their privacy and in some instances their safety threatened by unwelcome intrusions derived from public disclosure of their personal contact information. Often the proper balance is to disclose the name of an individual who has communicated with a department, or signed an attendance sheet at a public meeting, while not disclosing contact information for that individual.

But there may be some circumstances in which knowing the location of a person's home is relevant to the public's ability to monitor the operations of government, for example, because of the proximity of the home to a site that is the subject of a City decision. And there may be circumstances where people do not have a reasonable expectation of privacy in contact information they have provided to the City, for example, based on notices on a department's forms or website to the effect that information submitted will be a matter of public record. If a department is inclined to disclose contact information for private individuals or other information about members of the public of a personal nature, we recommend that the department consult the City Attorney's Office.

In some circumstances, especially when disclosure of a personnel record is a close question, it may be advisable as an administrative practice for the City to first notify the affected individuals about the planned disclosure. In rare cases, this process may allow the person to provide information to the department that would cause it to change its decision to disclose. Further, this process allows the affected individuals to attempt to protect their privacy interest by filing suit to prevent disclosure of ostensibly private information.

3. Pending litigation

A department may decline to disclose records relating to and developed during pending litigation to which the City is a party, until the litigation is finally adjudicated or otherwise settled. Cal. Govt. Code § 6254(b). But the City must disclose claims filed against it. Admin. Code § 67.24(b)(1)(i).

As a general rule, for the pending litigation exemption to apply, it is not enough that a record relate to the litigation. Rather, it must have been prepared for or in the course of litigation. Departments receiving requests for records relating to pending litigation should immediately contact the Deputy City Attorney handling the litigation.

4. Attorney-client communication

A department may decline to disclose any privileged communication between the department and its attorneys. State law makes communications that are made in confidence as part of the attorney-client relationship between the City Attorney's Office and City officials and employees privileged and confidential. Cal. Govt. Code §§ 6254(k), 6276.04; Cal. Evid. Code §§ 950 et seq.

The attorney-client privilege belongs to the client, not the attorney. Thus, records in the City Attorney's possession covered by the privilege must remain confidential unless the client – the City – consents to their disclosure. Cal. Bus. & Prof. Code § 6068(e). By the same token, with the City's authorization a department may disclose records in its possession covered by the privilege. We recommend that departments consult with the City Attorney's Office before releasing records of privileged attorney-client communications.

5. Attorney work product

Records that contain the work product of an attorney representing the City are protected from disclosure. Cal. Govt. Code §§ 6254(k), 6276.04; Cal. Code Civ. Proc. §2018.030. The attorney work product doctrine functions as a privilege, protecting from disclosure "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Cal. Code Civ. Proc. § 2018.030(a). This privilege may also extend to other records relating to the legal work of attorneys representing the City, including documents prepared at the request of the City Attorney's Office, such as reports by investigators, consultants, and other experts.

The attorney work product privilege is distinct from the attorney-client privilege and can cover records that the attorney-client privilege does not. And, unlike the pending litigation exception, the attorney work product privilege extends beyond records prepared for litigation purposes. Where the privilege applies to litigation records, it does not lose its force at the conclusion of litigation.

6. Informants, complainants, and whistleblowers

In some circumstances, departments may shield from disclosure the identity of persons complaining to the City about violations of law. Cal. Evidence Code § 1041. Privacy or other grounds may also authorize or require nondisclosure, even where the complaint does not allege a violation of law. Cal. Govt. Code § 6254(c). Substantial public interests often warrant withholding the identity of complainants. When, for example, a tenant complains about a landlord, a neighbor complains about a neighbor, an employee complains about an employer, or a citizen complains about a person making a public disturbance, disclosure of the identity of the complainant, the complaint, and/or the investigation could lead to retaliation against or harassment of the complainant and could also compromise the investigation. Under those circumstances the City may be able to withhold or redact the complaint and record of the investigation. See generally Cal. Evidence Code § 1040.

Ethics Commission Complaint No. 10-150331

Exhibit D

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR
CHAIRPERSON

PAUL A. RENNE
VICE-CHAIRPERSON

BRETT ANDREWS
COMMISSIONER

BEVERLY HAYON
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: January 20, 2015

To: Members, Sunshine Ordinance Task Force

From: John St. Croix, Executive Director
By: Jesse Mainardi, Deputy Executive Director

Re: Ethics Commission Policies for Sunshine Ordinance Task Force Referrals

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At its meeting on December 16, 2014, the Ethics Commission adopted the policies described below with respect to Sunshine Ordinance Task Force referrals. These policies are effective immediately. The Commission intends to ultimately memorialize these polices as regulations.

1. Inconsistencies between Task Force proceedings and referrals. The Commission considered how to handle Task Force referral letters that appear to: (1) include violations that are not addressed in one or more of the Task Force's proceedings;[1] (2) include respondents who are not named as such in one or more of the Task Force's proceedings; or (3) indicate that a violation is willful when no such allegation or finding was made in in one or more of the Task Force's proceedings. With respect to these issues, the Commission adopted the following policy:

- The Commission will consider at its hearing the violations and respondents indicated in a Task Force referral letter without reference to the Task Force's proceedings so long as the referral letter states that the named respondents were given notice and an opportunity to respond during the Task Force's proceedings with respect to all of the allegations in the referral letter.

2. Department and department head responsibility. The Commission considered what factors should bear on whether a department head is responsible for the violations of the Sunshine Ordinance by his or her staff and whether a department itself – as opposed to an individual City officer or employee – can be held responsible for violations of the Sunshine Ordinance. With respect to these issues, the Commission adopted the following policies:

- When asked to determine whether a City department head committed a non-willful violation of the Sunshine Ordinance, the Commission will consider the

[1] As used in this memorandum, the term "Task Force's proceedings" refers to the Task Force's hearing on the merits and committee meetings, as well as the original complaint, the Order of Determination, and the motion to refer the matter to the Ethics Commission.

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following non-exclusive list of factors: (1) whether the department head knew about the records request; (2) whether the responding staff member was a direct report or otherwise close in the chain of command to the department head; and (3) whether the department head had instituted insufficient Sunshine Ordinance compliance policies.

- When asked to determine whether a City department head committed a willful violation of the Sunshine Ordinance, the Commission will consider the department head's actual involvement in the records request or other matter, as well as any other relevant factors.

- The Commission may determine that a City department, instead of a City officer or employee, committed a non-willful violation of the Sunshine Ordinance.

3. Meaning of "authorized representative." The Commission considered how it will determine if a City officer or employee has fulfilled the obligation to send an "authorized representative" to a Task Force meeting to "explain the basis for its decision to withhold the records requested" as required under San Francisco Administrative Code section 67.21(e). With respect to this issue, the Commission adopted the following policy:

- The Commission will determine that any authorized representative of the respondent/custodian of the public records attending a Task Force hearing satisfies the requirement of section 67.21(e), so long as that representative is prepared to respond to the allegations set forth in the memorandum prepared by the City Attorney's Office for the Task Force with respect to the relevant matter.

Please feel free to contact us with any questions about these policies.

* * * * *

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Executive Recruitment Search

EXECUTIVE DIRECTOR, ETHICS COMMISSION

City and County of San Francisco, CA

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ALLIANCE
RESOURCE CONSULTING LLC

May 20, 2015

VIA ELECTRONIC MAIL

Mr. Brent Lewis
Deputy Director, Department of Human Resources
City and County of San Francisco
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Dear Mr. Lewis:

Alliance Resource Consulting is pleased to submit this proposal to assist the City and County of San Francisco in its efforts to recruit and screen candidates for the Executive Director, Ethics Commission position. Enclosed is our proposal which outlines how we would partner with your organization to recruit the best individuals. It describes the steps we will take to accomplish the recruitment within your desired timeframe. If you desire some modification of the proposed work program, we would be pleased to discuss that with you.

Alliance Resource Consulting's corporate motto is "The Power of Partnership." We take this seriously and have built our reputation on providing services of the highest quality. Alliance Resource Consulting was formed in 2004 when our executive search consultants acquired the highly regarded executive search practice of one of the largest public sector consulting/government services companies in the United States. With the innovative use of technology and a commitment to forming enduring partnerships with our clients, Alliance Resource Consulting is committed to setting a new standard for the industry.

We do not have any potential conflicts of interest from past recruitments or relationships. We will be happy to answer any additional questions you may have. We look forward with great interest to working with you on this very important assignment.

Sincerely,

Sherrill Uyeda
Founding Partner

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ALLIANCE
RESOURCE CONSULTING LLC

EXECUTIVE DIRECTOR, ETHICS COMMISSION

City and County of San Francisco, CA

1 – OUR UNDERSTANDING

It is our understanding that the City and County of San Francisco wishes to engage an executive search firm to assist in the Executive Director, Ethics Commission recruitment.

The Executive Director, Ethics Commission should be experienced in the drafting and administrating of laws related to campaign finance regulation, lobbyist and campaign consultant activity, conflict of interest and government ethics. He/She will establish and maintain working relationships with Commission members, elected and appointed officials, staff, other departments and organizations, media and the general public.

Alliance Resource Consulting prides itself on its commitment to customer service to both the client and the candidates.

2 – FIRM QUALIFICATIONS

2.1 Project Team

In 2004, Alliance Resource Consulting acquired the national executive recruiting practice of MAXIMUS. We are committed to providing our clients with the highest caliber of service in the industry. Our team of dedicated professionals utilizes custom-built state-of-the-art technology in conducting a search.

We are based out of Long Beach, California and are the only firm in California to provide unlimited on-site visits to in-state clients. We also have offices in Palo Alto, California; Tallahassee, Florida and Seattle, Washington.

Our current staffing is:

Sherrill Uyeda – Founding Partner
Cindy Krebs - Regional Director, Pacific Northwest
David McDonald – Regional Director, East Coast
Syldy Tom – Manager
Richard Kaplan – Research Consultant
Geoff Gambling – Research Consultant
Daniela Pallafacchina – Research Consultant
Linda Kann – Special Projects and Graphics Manager

Sherrill Uyeda and Cindy Krebs will work on this recruitment. Biographies can be found in Appendix A and references can be found in Appendix B.

2.2 Our Experience

We believe we are exceptionally well qualified to assist you. We have extensive nationwide experience recruiting executives for government agencies and special districts and have helped to place excellent diverse people in both small and large organizations.

Recently, we recruited the Human Resources Services Director - Public Utilities Commission for your organization.

We are currently recruiting the Director of Public Affairs for the Municipal Water District of Orange County. In the last few years, we have also completed the following recruitments which had similar duties and responsibilities:

- Director of Records and Elections for the City of Santa Monica, CA
- Executive Director, Water Policy for the Irvine Ranch Water District, CA
- Senior Mediator for Kearns and West (San Francisco, CA)
- Director of Government Affairs for the North Texas Tollway Authority (Dallas, TX)

We previously completed the recruitments for the Chief Legal Counsel for the Los Angeles County Employees Retirement Association (CA), County Counsel for Los Angeles County (CA), County Counsel for Contra Costa County (CA), General Counsel for Metrolink (CA) and General Counsel for Alameda-Contra Costa Transit District (CA).

Our ability to carry out the work required by your agency is enhanced by our past experience in providing similar services to others, and we expect to continue such work in the future. It should be noted that all of the recruitments listed above were completed on time and within budget.

We will preserve the confidential nature of any information received from you or developed during our work on this recruitment in accordance with our established professional standards.

We assure you that we will devote our best efforts to carrying out the work required. The results obtained, our recommendations and any written material we provide will be our best judgment based on the information available to us.

2.3 Advantages of Our Firm

Relative to your present search requirements, we believe the principal advantages in using Alliance Resource Consulting which differentiate us from other firms are:

- Our track record of success in placing superior senior level executives in particularly sensitive and highly responsible/accountable positions.
- Our specialization in public sector executive search on a nationwide basis.
- Our extensive experience recruiting executives for government agencies and special districts.
- Our PROACTIVE recruitment of candidates who may not be seeking new employment and would not normally respond to routine advertising and highly qualified candidates who might be overlooked by traditional recruiting approaches.
- Our ability to develop and meet a recruitment timeline to fit your needs.
- The fact that we assign two professionals to each recruitment to ensure we are always available to quickly respond to your most pressing requirements.
- The quality of our work and the fact that most of our clients have retained our services on more than one engagement.
- Our proven ability to identify and recommend qualified female and minority candidates.
- The transparency of our recruitment process. We will provide you a client login to our recruiting system so you can see how things are progressing at any time. We will also prepare weekly updates for you throughout the peak of the recruiting process.

- Our reputation among clients and candidates for timely communication and documentation (e.g., acknowledgement of receipt of candidate application, client status reports, candidate interviews, client meetings and candidate feedback).
- The thoroughness of our documented reference, internet and background checks. We request very specific references from candidates and supplement our reports with information gathered from available information sources such as LexisNexis and public records. Our ability to enhance the recruitment process through stakeholder outreach, the use of online surveys, and targeted research.
- The fact that all of our graphics work is done in-house, saving our clients time and money.
- Our promise to conduct the recruitment at the cost proposed. We have never charged a client more than our proposed amount.

3 – RECRUITMENT METHODOLOGY & APPROACH

Alliance Resource Consulting believes that we are an extension of your organization. As such, we work within your expectations and guidelines. Our objective is to find the best qualified candidates. While notices in professional journals may be helpful, many of the best candidates must be sought out and their interest encouraged. Our general familiarity with the organization, knowledge of the field and our relationships with professional organizations make us well qualified to assist you.

Our clients have found that we are able to:

- Develop the appropriate specifications for a position.
- Encourage the interest of top-level people who would be reluctant to respond to advertisements.
- Preserve the confidentiality of inquiries, consistent with State public disclosure and open meeting laws.
- Save a considerable amount of time for client staff in developing and responding to candidates.
- Protect the confidentiality of the information discussed with or received from the client.
- Build consensus among those involved in the hiring process.
- Independently and objectively assess the qualifications and suitability of candidates for the particular position for which we are recruiting.
- Adhere to client's budget and schedule expectations.

If you desire to retain us for a full and thorough recruitment process, we will do the following for your recruitment:

3.1 Strategy Development

We will interview members of the Search Committee and other client contacts to obtain a detailed understanding of the position, key goals and challenges, and organizational culture. We will also discuss expectations regarding desirable training, experience and personal characteristics of candidates. In addition, should you request it, we will conduct/facilitate community outreach meetings and focus group discussions.

We also have experience creating and managing community surveys, should the organization want input from its constituents. We will also gather/review relevant information about the organization, such as budgets, organization and/or department goals, organization charts, etc.

Once our findings have been summarized, we will submit a Recruitment Profile with the desired qualifications and characteristics to you for approval. The Recruitment Profile that will be sent to potential candidates will include information about the organization, the job and the criteria established by you.

3.2 Active Recruitment

Once you have approved the Recruitment Profile, we will actively seek out individuals who meet your expectations. To achieve the best response, we will take a three-prong approach to attracting candidates:

1. **Direct Contact** – We will mail invitations and recruitment profiles to targeted individuals in comparable organizations at the appropriate level. These invitations will be followed up with direct phone calls to potential candidates to gauge interest.

2. **Internal "Job Alert"** – Over the past ten years, we have developed an active database of over 19,000 candidates who are active in various public sector positions. We will send a new "job alert" to all our registered users in the Alliance Resource Consulting candidate application program. Prospective candidates will be contacted via e-mail with a link to the PDF version of the Recruitment Profile.

3. **Advertisements** – We will place job advertisements in the appropriate professional journals and on-line sites.

As a matter of corporate policy, we do not discriminate against any applicant for employment on the basis of race, religion, creed, age, color, marital status, sex, sexual preference, disabilities, medical condition, veteran status or national origin. A substantial percentage of the placements made by our firm have been minority or female candidates.

Frequent communication with our clients is a hallmark of our firm. While consultants will provide regular updates on the progress of your search, you will also be able to access up-to-date 'real time' information regarding your search from our secure website.

3.3 Candidate Evaluation

We will review, acknowledge and evaluate all resumes received. Candidate evaluation will begin with an analysis based upon criteria contained in the Recruitment Profile, information contained in the resumes submitted to us, and our knowledge of the people and organizations for which they work.

The next phase in candidate evaluation will focus on gaining additional information from the qualified group of candidates through written supplemental information questionnaires and other resources. Telephone interviews will be conducted with the most promising candidates to gain a better understanding of their backgrounds, qualifications and interest in the position.

3.4 Progress Report Meeting

After the resume deadline, we will submit to you a progress report of the leading candidates. This report will include summary resumes, supplemental information, and the original resumes of those candidates we believe to be best qualified for the position. Supplemental information on a candidate typically includes: the size of the organization for which the person works, reporting relationships, budget responsibility, the number of people supervised, related experience and reasons for interest in the position. Any other specific information will be dictated by the criteria set forth in the Recruitment Profile.

The purpose of our progress report is two-fold. It allows you an opportunity to review the candidates and choose those who you would like to invite to be interviewed for the position. It also allows us to receive feedback on the caliber of the candidates recruited. In addition, at this point we will have conducted preliminary background checks on each of the presented candidates. Of course, we are flexible and may consider other individuals as final candidates who are subsequently identified and were not included in the progress report.

3.5 Preliminary Interviews

We will interview (either in person or via video-conference) those candidates identified by you to be the leading candidates. We will conduct a preliminary interview with questions that focus on the selection criteria. Additionally, we will verify degrees and certifications and continue to gather information about the candidate's professional backgrounds.

3.6 Client Interviews & Interview Books

We will assist you in scheduling final candidates for interview with your organization, and will send the candidates packets of information which we obtain from you should you request it (e.g., information about the organization and the geographic area, budgets, etc.).

We will prepare final interview books for the selection panel. These books will include interviewing/selection tips, suggested interview questions, and rating forms for your use. Candidates will not be ranked, for we believe it will then be a matter of chemistry between you and the candidates.

We will also be on-site for the interview day(s). We will brief the interview panel at the start of the interviews and will facilitate the process throughout the day. After the last candidate interview, we will assist you in "debriefing" the interview panel members.

As part of our process in evaluating candidates, we make telephone reference checks. In conducting these references, it is our practice to speak directly with individuals who are, or have been, in a position to evaluate the candidate's performance on the job. To gain a well-rounded impression of the candidates, we speak with current and prior supervisors, peers and subordinates. These references and our evaluations provide you with a frank, objective appraisal of the candidates. Once we finalize references on the top one or two candidates and conduct credit/criminal/civil litigation/motor vehicle record checks through an outside service, we will provide you with a detailed candidate evaluation report.

3.7 Special Assistance

Our efforts do not conclude with presentation of the final report. We are committed to you until a successful placement is made. Services that are routinely provided include:

- Arranging the schedule of interviews and the associated logistics for final candidates.
- Advising on starting salary, fringe benefits, relocation trends and employment packages.
- Acting as a liaison between client and candidate in discussing offers and counter offers.
- Conducting a final round of reference checking with current employers (if not previously done for reasons of confidentiality).
- Notifying those candidates who were not recommended for interview of the decision. Following up with the client and the selected candidate once he/she has joined the organization to ensure a smooth transition.

4 – OUR CLIENT'S ROLE

The client has a very important role in the recruitment process. While we may identify and recommend qualified candidates, it is the client who must make the decision about which candidate to hire.

In order to insure that the best candidates are available from which to choose, our clients should be willing to do the following:

- Clearly inform us about matters relevant to the search that you wish to keep confidential (e.g., salary, personnel issues, and other privileged information).

- Supply us with the names of people you have previously interviewed/ considered for this position.
- Forward us copies of the resumes you receive, to avoid duplication of effort.
- Provide feedback to Alliance Resource Consulting regarding the information and recommendations provided by us.
- Promptly decide upon and follow up in scheduling interviews with the most promising candidates.
- Assist in providing information to candidates that will enable them to make their career decisions.
- Uphold confidentiality (while respecting relevant state laws about open disclosure) to protect the integrity of the recruitment process, as well as the candidate's involvement.

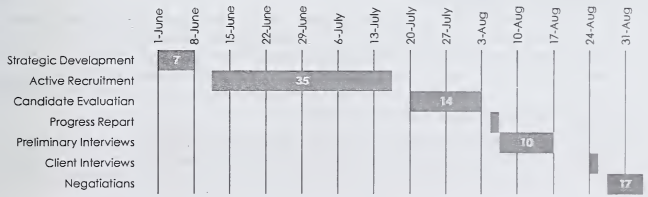
By doing the above, we will maximize the likelihood of mutual success.

Finally, please be reminded that the United States Immigration Reform and Control Act of 1986 requires that all employers verify an employee's eligibility to work in the United States. Since Alliance Resource Consulting cannot serve as your agent in this matter, your hiring process should include this verification procedure.

5 – PROJECTED TIMELINE

The following is a typical schedule to conduct a thorough recruitment. However, we would be pleased to modify this to meet your needs:

1st Week	Meet with the appropriate individuals to gather background information.
2nd - 3rd Week	Develop and obtain approval for the Recruitment Profile. Develop a list of potential candidates to target. Prepare and place advertisements, if desired.
4th - 9th Week	Active recruitment—solicit, receive and acknowledge resumes.
10th Week	Evaluate resumes and gather supplemental information. Submit progress report and meet with you to review leading candidates.
11th Week	Verify degrees and certifications and interview the best qualified candidates.
12th - 14th Week	Submit final report and initiate the interview process with you.
Following Interviews	Conduct references, credit/criminal/civil litigation/motor vehicle record checks, and assist with negotiations.



6 – ALLIANCE ADVANTAGES

6.1 Technology

Alliance Resource Consulting is the only firm to utilize a custom-built "online" client/candidate management system. This custom system allows candidates to input their resumes and cover letters on our website. (For candidates who wish to email or mail us a hard copy of their resume, we will input the information for them.) One of the benefits of our system is that it enables our client contact to check the latest applicant list in real-time.

One of our strengths is our use of social media to best market the recruitment. We have active accounts on LinkedIn, Twitter and Facebook. The use of social media allows us to contact our network and "followers" to alert them to our recruitment announcements, informational updates and reminders. It allows us to stay one step ahead of our competitors.

Alliance Resource Consulting is always searching for new ways technology can help us save our client's money. One way we do this is by using Skype to interview out of town candidates. Our innovative ways have set us apart from our more traditional competitors.

6.2 Stakeholder Outreach

Our firm has used several methods, including stakeholder meetings, community forums and surveys, for stakeholder outreach in a number of previous recruitments. For example, for the City of San José City Manager recruitment, our consultants facilitated 13 community outreach meetings where citizens were invited to attend and express their opinions about what they were looking for in city manager candidates. For the City of Alexandria's City Manager recruitment, we also met with special interest groups such as business leaders, Chamber of Commerce members and historic preservation groups.

During the recruitment of the City Administrator for the City of Huntington Beach (CA), the consultants met with each councilperson, each department head, conducted an open citizen forum and a forum for a group of stakeholders comprised of two citizens recommended by each councilperson. For the City Manager recruitment conducted for the City of Moreno Valley (CA), the consultants conducted a community panel as well. Our previous experience in stakeholder outreach makes our firm very qualified to conduct the meetings with the Mayor's Office and City Council Members as well as facilitate multiple stakeholder outreach forums throughout the City that your request for proposal outlined.

Lastly, our firm has significant experience in creating community surveys should you wish to provide this option to your community. We have utilized surveys for many of our recruitments and can prepared them in different languages, if required. The surveys can be accessed on-line, or at our office and our client's office.

6.3 Diversity Outreach

Striving for diversity in our recruitments is a hallmark of our firm. We use a variety of sources for outreach to various minority communities to ensure the desired diversity of our candidate pool. In addition to our personal contacts in various minority communities, we advertise our positions in publications that target minorities in government and further publicize the position through minority organizations such as Blacks in Government and the International Hispanic Network. To ensure a diverse pool, we also create a recruiting list of qualified candidates from communities that have a comparable level of diversity as our client's community.

We have created lists for comparable diversity during recruitments for the City Manager for the City of Compton (CA), the City of Tigard (OR), the Assistant City Manager/Chief Operating Officer for the City of Ventura (CA), and the Assistant City Manager for the City of Irvine, CA. The final pool for the City of Irvine included three women

among the six finalists. We also collect Equal Employment Opportunity (EEO) information on our candidate pool. This information is accessible to our clients in real time on our company website.

6.4 Weekly Client Updates

Our consultants provide our client contacts written recruitment updates on a weekly basis. These updates include work done that was completed during the week and what we expect to work on the following week.

7 – RECRUITMENT COSTS

The three major client meetings will be: one to develop the Recruitment Profile, one to present our Progress Report, and one to attend the first round of candidate interviews. We propose a professional fee of $20,000 for the work outlined above. In addition, we are reimbursed for expenses such as for advertising, travel, interviewing, sourcing, support services, background checks and other related items, as well as allocated costs such as telephone, postage and photocopying. These expenses will not exceed $8,500 per recruitment. Please note that this amount does not include reimbursement of candidates who travel to be interviewed by you. Unless you notify us to the contrary, we will assume that you will handle these reimbursements directly.

Our professional service fee will be split among four equal invoices and expenses will be billed as they are incurred. All invoices are due and payable upon receipt. We do NOT base our fees on a percentage of the position's salary.

Our billing schedule on a retained professional fee (and based not on an hourly rate) is as follows:

1st Billing	Due after Start Meeting	First Phase	$5,000
2nd Billing	Due upon our submittal of a draft recruitment profile	Second Phase	$5,000
3rd Billing	Due after we meet and submit our Progress Report to you	Third Phase	$5,000
4th Billing	Due after the client conducts interviews with finalists	Fourth Phase	$5,000

Please note that this is a standard billing schedule and can be modified as requested.

You may discontinue this assignment at any time by written notification. In the unlikely event that this occurs, you will be billed for all expenses incurred to the date of the cancellation, and for professional fees based upon the time elapsed from the commencement of the assignment to the date of cancellation. If a cancellation occurs within the first 30 days of the assignment, following either verbal or written authorization to proceed, one-third of the professional fee will be due. If a cancellation occurs thereafter, the fee beyond the first one-third will be prorated based upon the number of calendar days which have elapsed. If a cancellation occurs after 90 days, all professional fees will be due in full.

Guarantee

We are committed to working with you until a placement is made. However, if the selected candidate (recommended by us for hire, and excluding internal candidates) should be terminated within one year from the date of hire, we will re-do the search for no additional professional fee. Naturally, we would expect to be reimbursed for any expenses that might be incurred.

8 – ALLIANCE SUMMARY

Thank you for reviewing our proposal. Should you decide to retain Alliance Resource Consulting for your executive search needs, we will do the following:

- Partner with you and act as an extension of your organization.
- Define a recruitment strategy and timeline, develop a recruitment profile and attract/research prospective candidates.
- Conduct a multi-layered candidate screening analysis on the applicants.
- Communicate frequently and on-time with both the client and candidates.
- Allow client contacts to access the recruitment database in real time from remote sites.
- Interview and screen leading finalists.
- Facilitate the client interview process.
- Complete the candidate selection and closure of recruitment.

Our firm's motto is "the Power of Partnership" and we are committed to adding value to your organization's goals and mission. We bring an ethical, transparent and well-documented recruitment process to all our clients.

9 – CONTACT INFORMATION

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Alliance Resource Consulting LLC

APPENDIX-A
BIOGRAPHIES

Sherrill A. Uyeda – Founding Partner

Sherrill Uyeda has over fifteen years of public sector executive search experience. She began her career in executive search in 1998 with Norman Roberts & Associates, Inc. From 1999 to 2004, Ms. Uyeda was an executive search consultant with MAXIMUS, a leading government consulting firm which assists state, federal and local governments. In 2004, along with Eric J. Middleton, she founded Alliance Resource Consulting LLC.

Since 2007, Ms. Uyeda has been instrumental in expanding the organization's presence to include regional offices in Palo Alto (CA), Tampa (FL) and Seattle (WA). She fosters an environment of frequent communication to both clients and candidates and transparent and ethical recruitments on a timely basis. Her leadership and collaborative skills have led to an impressive hiring and retention rate.

Ms. Uyeda's track record of recruiting high-profile government executives across the nation in various industries include: city and county management, transportation, utilities, human resources, library services, building and planning, economic development and pension and retirement systems. Past clients for nationwide recruitments have included the City/County of San Francisco (CA), the County of Los Angeles (CA), Arlington County (VA), Broward County (FL), the City of Atlanta (GA), the City of Alexandria (VA), the City of Boston (MA), the City of Dallas (TX), and the City of San José (CA). Past retirement systems, she has recruited for are: Contra Costa County Employees Retirement Association, Fresno County Employees Retirement Association, Kern County Employees Retirement Association, Marin County Employees Retirement Association, Santa Barbara County Employees Retirement System, and Sonoma County Employees Retirement Association.

Additional areas of expertise include: facilitating community forums and outreach meetings, conducting multi-lingual citizen surveys and compensation and benefits negotiations.

Ms. Uyeda graduated from the University of Southern California, with both a Bachelor of Arts degree in Communication Arts and Sciences and a Master of Public Administration degree. She is a member of the Society for Human Resources Management.

Cindy Krebs – Regional Director

Cindy Krebs joined Alliance Resource Consulting in 2012 after serving more than 25 years as a high level manager and principal consultant for local governments, regional agencies and special districts. The experience she gained while working in the public sector gives Ms. Krebs a unique understanding of the complexities associated with public service careers as well as a strong appreciation for people who choose to dedicate themselves to improving the communities they serve. Ms. Krebs is highly adept at working with executive management teams, Board members, and community/special interest groups and has managed several high profile recruitments for Alliance.

Ms. Krebs graduated from Baker University with Bachelor of Art degrees in both Communications and Spanish. She is also a graduate of CORO's Orange County Leadership program. Ms. Krebs is fluent in Spanish and proficient in French and Italian.

APPENDIX–B
REFERENCES

Los Angeles County, CA
Name: Carla Williams
Title: Assistant, Executive Recruitment Services
Phone #: (213) 974–1391

Contra Costa County, CA
Name: David Twa
Title: County Administrator
Phone #: (925) 335–1086

City of San Jose, CA
Name: Rick Doyle
Title: City Attorney
Phone #: (408) 535–1260

City of Alexandria, VA
Name: Steve Mason
Title: Assistant Director of Human Resources
Phone #: (703) 838–6343

ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

PAUL. A. RENNE
CHAIRPERSON

BRETT ANDREWS
CE-CHAIRPERSON

BEVERLY HAYON
COMMISSIONER

BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
CUTIVE DIRECTOR

EXECUTIVE DIRECTOR'S REPORT
TO THE SAN FRANCISCO ETHICS COMMISSION
For the Meeting of June 29, 2015.

1. Budget and Staffing

The Mayor's proposed budget for the Ethics Commission for Fiscal Year 2015/16 is 3,927,460, which is $646,894 less than the current fiscal year budget of $4,574,354. This is primarily due to a reduction of $617,179 in the deposit to the Election Campaign Fund which would normally be about $2 million but this year is only $1.3 million. The reason for this reduction is that the Election Campaign Fund is capped at $7 million and will reach that cap with this lower deposit.

The primary portion of this reduction is reflected in the $50,000 "addback" to the Commission's budget in the current fiscal year from the Board of Supervisors. That $50,000 was a one-time addition and so is not reflected in this proposed budget. The remaining $24,645 in reductions are a 3% reduction in Fringe Benefit costs, an 8% reduction in Services from Other Departments (rent, phones, mail, training, etc.) and a 22% reduction Professional and Contractual Services (ie copier/equipment rentals, Court Reporters, Process Servers, online subscriptions like Lexus/Nexus and our web domain etc.).

These reductions are offset by an increase in staff funding of $44,930. However, this will not be enough to fund an additional staff member.

For the following Fiscal Year 2016/17, the proposed budget is increased by $780,673. Most of this is attributable to a return to the normal deposit to the Election Campaign Fund, an increase of $681,668. The remaining increase of $99,005 includes a 1% increase to Services of Other Departments, and a 3% increase in fringe benefits.

There is also in increase of $79,948 in staff funding. This will be enough to fund an additional staff position.

On Monday, June 15, I made a presentation to the Board of Supervisors Budget and Finance Committee regarding our proposed budget. As part of the presentation, I petitioned the Board Members to consider adding funding to our budget specifically for additional staff.

The final budget will be released on July 14. The first vote at the Board will take place on July 21 and the final vote will be on July 28.

25 Van Ness Avenue, Suite 220 • San Francisco, CA 94102-6053• Phone (415) 252-3100• Fax (415) 252-3112
E-Mail Address: ethics.commission@sfgov.org Web site: http://www.sfethics.org

2. Investigation and enforcement program.
As of June 15, 2015, there were 17 pending formal complaints alleging violations within the Ethics Commission's jurisdiction.

Category	# of Complaints
Campaign Finance	6
Conflict of Interest	5
Governmental Ethics	1
Lobbyist Ordinance	4
Campaign Consultant Ordinance	0
Sunshine Ordinance	1
TOTAL	**17**

Enforcement Summaries

- On May 27, 2015, the Ethics Commission entered into a stipulated agreement with James Reuben. Mr. Reuben admitted to committing one violation of San Francisco Campaign & Governmental Conduct Code section 2.110(c), and agreed to pay a penalty of $500. A copy of the agreement is available on the Commission's website.

- On May 27, 2015, the Ethics Commission entered into a stipulated agreement with Jane Kim, Jane Kim for Supervisor 2010. Ms. Kim admitted to committing one violation of California Government Code section 84104, one violation of California Government Code, section 84300(b), and two violations of San Francisco Campaign & Governmental Conduct Code section 1.114(a), and also agreed to pay a penalty of $5,700. A copy of the agreement is available on the Commission's website.

- On May 27, 2015, the Ethics Commission determined that the San Francisco Arts Commission committed one non-willful violation of Sunshine Ordinance, section 67.27(a).

3. Campaign finance disclosure program.
a. Filing deadline. On April 20, 2015, seven committees were added to the Commission's Non-Responsive Filers List for failing to file their required campaign statement for the period ending 12/31/2014, which was due 2/2/2015. The next filing is July 31, 2015 for the First Semi-annual statement, which covers the reporting period ending June 30, 2015. In the interim, staff receives and processes campaign statements for this and other filing deadlines. Staff continues to answer questions from and conduct outreach to candidates and other committee representatives about campaign finance filing obligations.

b. Collection of late filing fees and contribution forfeitures. In the fiscal year 2014 -2015, as of June 15, 2015, the Commission collected $24,664 in late fees and forfeitures. As of June 15, 2015, the Commission's outstanding late fees and forfeitures were $7,351, of which $6,601 is pending at the Bureau of Delinquent Revenues (BDR). Of the $17,601 referred to BDR, $11,000 consists of administrative penalties.

c. Status of accounts to San Francisco Bureau of Delinquent Revenues (BDR). The following chart provides details on active accounts referred to BDR as of June15, 2015:

#	Committee/ Filer	ID #	Treasurer or Responsible Officer	Date referral effective	Original amount referred	Last month's balance	Current balance (Changes are in bold)	Status
1	Chris Jackson For Community College Board	1347066	Chris Jackson	7/12/13	$6,601	$6,601	$6,601	Pending at Small Claims Court
2	Committee to Elect Norman For Supervisor	1327771	Jacqueline Norman	5/01/15	$9,000	-	$9,000	
3	Bob Squeri For District 7 Supervisor 2012	1346150	Bob Squeri	5/01/15	$2,000	-	$2,000	
						TOTAL	$17,601	

4. Revenues report.

For fiscal year 2014-2015, the Commission was budgeted to generate $70,000 in revenues. As of June 15, 2015, the Commission received $145,804 or 208% of anticipated revenues for the year.

Source	Budgeted Amount FY 14-15	Receipts
Lobbyist Fees	$37,000	$93,500
Other Ethics General	$1,000	$10
Campaign Finance Fines	$23,000	$24,664
Campaign Consultant Fees	$5,000	$15,000
Lobbyist Fines	$1,000	$50
Statements of Economic Interests Fines	$1,000	$1,420
Other Ethics Fines	$1,000	$9,500
Campaign Consultant Fines	$1,000	$1,660
Unallocated	$0	$0
Total	$70,000	$145,804

5. Lobbyist program.

As of June 15, 2015, 140 individual lobbyists were registered with the Commission. Total revenues collected to date for the 2014-2015 fiscal year amount to $93,550, including $93,500 in lobbyist registration fees, and $50 in lobbyist fines. The filing deadline for the next lobbyist disclosure statement is July 15, 2015.

6. Campaign Consultant program.

As of June 12, 2015, 22 campaign consultants were registered with the Commission. $15,000 in registration fees and $1,660 in fines have been collected so far during the 2014-2015 fiscal year.

The next campaign consultant quarterly report deadline is Tuesday, September 15, 2015, covering the reporting period from June 1, 2015 through August 31, 2015. Staff will send reminders to all active campaign consultants prior to the deadline.

7. Statements of Economic Interests.
As of June 22, 2015, 475 persons (98 percent) have filed their Annual Form 700 with the Ethics Commission. Reminders have been e-mailed to filing officers and non-filers, and a second round of formal warning letters will be sent in early July. Staff is also following up with filing officers and non-filers who have overdue Assuming Office and Leaving Office Form 700s.

8. Permit Consultant Program
As of June 24, 2015, 21 individuals have registered with the Permit Consultant program. Sixteen Disclosure Reports for the period January 1 to present have been received. The Department of Building Inspection has provided several sets of data (including the value of the estimated construction costs and the City officers or employees who were contacted in an attempt to obtain the permit) from its permit consultant database. Ethics Commission staff is analyzing the usefulness of the data for identifying potential registrants.

9. Outreach and Education.
On Friday, June 19, staff and DCA Andrew Shen participated in a Meet and Discuss with the Executive Director of the Municipal Executives' Association to answer questions about the proposed regulations for electronic filing of Form 700s for all city employees. All bargaining units that represent CCSF employees were invited to attend, and those unions that responded to the opportunity to meet and discuss the changes were provided drafts of the proposed regulations. The discussion was mediated by an Employee Relations Representative from the Department of Human Resources.

On June 4, 2015, staff conducted a training on state and local campaign finance laws that apply to candidates running for office in the November 3, 2015 election. Upcoming candidate training sessions will be held on July 7 and August 13. Training sessions for ballot measure committees will be held on July 28, August 19 and September 10. Training sessions for general purpose committees (also referred to as political action committees) are scheduled for July 29, August 6 ans September 2. In addition to conducting live training sessions, the Commission has posted the training presentations on its website. Separately, on an on-going basis staff provides training to candidates and campaign treasurers on using the Commission's online electronic filing system, SFEDS.

Additionally, the Commission continues to offer trainings on Statements of Incompatible Activities to City departments via web trainings. The following are web video trainings available on the Commission website:

Department of Building Inspection SIA Training
Controller's Office SIA Training
Department on the Environment SIA Training
Governmental Ethics Ordinance Training for City Employees
Medical Examiner's Office SIA Training

Non-Candidate Recipient Committee Training
Public Utilities Commission SIA Training
SIA Template Language Training

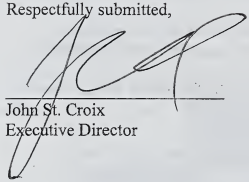
11. Staff Project Calendar.
The staff project calendar for 2015 which was approved by the Commission in March follows:

	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
1. Limits for candidate-controlled committees			Sched. Actual			Sched.			
2. Reporting of bundling								Sched.	
3. "Public benefit" contribution bans									
4. Slate mailer filings									
5. Enforcement regulations/policies									Sched.
6. Forfeiture/late fine penalties									
7. Expenditure lobbyists			Actual						
8. Additional gift of travel reporting									
9. Permit Consultant regulations									
10. Form 700 electronic filing		Sched.	Actual						

Notes:
- Shaded squares indicate planned staff work on the issue. Issues with no shaded squares will not be addressed by staff in 2015.
- "Sched." indicates the Commission's planned consideration of the issue at a public meeting during that month. .
- "Actual" indicates the Commission's actual consideration of the issue at a public meeting during that month.

12. Language Access Ordinance Compliance
Seventeen key documents regarding the Ethics Commission's services and programs have been submitted to LanguageLine Solutions for translation into traditional Chinese, Spanish, and Tagalog. Language regarding the availability of translation and interpretation services is also being translated, and will be added to the website. The translations are scheduled for staggered delivery starting the third week of July, with final delivery by August 11, 2015. A list of the 21 languages that the City provides telephonic interpretation for has been posted in the public area of the office, and staff is working with the Office of Civic Engagement & Immigrant Affairs to develop a recorded telephonic message about office hours and services. Staff is also creating an Annual Compliance Plan, which will include a description of the Ethics Commission's language access policy, and the protocols that staff will follow if language services are requested.

Respectfully submitted,



John St. Croix
Executive Director

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Minutes of the Special Meeting of
The San Francisco Ethics Commission
June 29, 2015
Room 400 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

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I. Call to order and roll call.

Chairperson Renne called the meeting to order at 5:30 PM.

COMMISSION MEMBERS PRESENT: Paul Renne, Chairperson; Brett Andrews, Vice-Chairperson; Beverly Hayon, Commissioner; Ben Hur, Commissioner; Peter Keane; Commissioner.

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst; Catherine Argumedo, Investigator/Legal Analyst; Steven Massey, Information Technology Officer; Pat Petersen, Training Officer.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA), Andrew Shen, DCA.

OTHERS PRESENT: Patrick Monette-Shaw; Rebecca Rhine; Jean Caramatti; Alex Thomason; Charles Marsteller; Marc Solomon; Larry Bush; Bob Planthold; Bob Dockendorf; John St. Claire; Sue Hestor; Anita Mayo; Elli Abdoli; Chris Wright; Sharyn Saslafsky; Derek Kerr; Elena Schmid; Eric Pawlowsky; and other unidentified members of the public.

MATERIALS DISTRIBUTED:

- Staff Memorandum to Ethics Commission members, dated June 24, 2015, re: Adoption of Proposed Regulations Implementing Electronic Filing of Statements of Economic Interests for All City Employees;
- Legislative Digest on Initiative Ordinance, Campaign and Governmental Conduct Code, Expenditure Lobbyists;
- Initiative Ordinance, Campaign and Governmental Conduct Code, Expenditure Lobbyists;
- Summary of Interested Persons Meeting held on June 10, 2105;
- Proposed Ethics Commission Response to Civil Grand Jury Report "San Francisco's Whistleblower Protection Ordinance is in Need of Change;"
- Civil Grand Jury Report "San Francisco's Whistleblower Protection Ordinance is in Need of Change" dated May 2015;
- Staff Memorandum to Ethics Commission members regarding Hearing on Ethics Complaint 10-150331, Report and Recommendation on Ethics Complaint 10-150331 and attachments;
- Alliance Resource Consulting LLC Proposal for Executive Director Recruitment Search;
- Draft Minutes of the Special Meeting of the San Francisco Ethics Commission of May 27, 2015;
- Draft Minutes of the Special Meeting of the San Francisco Ethics Commission of June 5, 2015;

- Executive Director's Report.

II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.

Patrick Monette-Shaw stated that the Ethics Commission received two conflict of interest complaints against San Francisco Retirement Board member Wendy Paskin-Jordan. He stated that most people believe that he filed those complaints even though he did not. He stated that Ms. Paskin-Jordan admitted on a Youtube video to aggregating funds with her firm to reach the 10 million dollar threshold. He stated that the Ethics Commission must investigate.

Rebecca Rhine stated that she represents the Municipal Executives Association (MEA). She stated that MEA members have expressed privacy concerns regarding the Commission's consideration of posting online all Statement of Economic Interests Form 700s.

III. Discussion regarding draft regulations for electronic filing and website posting of Statements of Economic Interests (FPPC Form 700).

Deputy Executive Director Mainardi introduced the item and explained what it means to be a "designated" employee subject to the requirements to file a Statement of Economic Interests Form 700. He stated that Form 700s filed by designated employees who are not elected, appointed, or a department head, are currently filed with each department. He stated that the proposed amendments would mandate that designated employees file their Form 700s electronically with the Ethics Commission.

Responding to Chair Renne, Deputy Executive Director Mainardi stated that elected and appointed officials and department heads must file with the Ethics Commission by law, and that this change would create a central database for all Form 700s filers, including those filed by designated employees. Deputy Executive Director Mainardi also stated that the online copies of Form 700s will be redacted to protect addresses, phone numbers, and the names of sources of rental income, but that the hard copies would not be redacted and would be available upon request.

DCA Shen stated that most designated employees who file a Form 700 are not required to attend ethics trainings like elected and appointed officials and department heads must do, and that the proposed regulations do not institute a training requirement.

Vice-Chair Andrews stated that training should be provided if employees are going to be held accountable for the information provided on a Form 700.

Deputy Executive Director Mainardi stated that the proposed regulations do not change who has to file, which is determined at the departmental level, only that those employees who already file with their department must now file online.

Responding to a question by Commissioner Hur expressing concern that an employee could be easily harassed if financial information is readily available online, Deputy Executive Director Mainardi stated that an employee could submit a request to have the Form 700 removed from the online database, and if granted, that it would be reported to the Commission.

Chair Renne stated that anyone could, right now, go to a department and retrieve an unreacted copy of a filer's Form 700.

Public Comment:
Patrick Monette-Shaw stated that Form 700s are public documents and currently available to any member of the public so concerns regarding employee privacy are moot. He stated that concerns about the lack of training are "nonsense" because training on Form 700 filing is available online and can be viewed while at work. He stated that contractors with the City should also be required to file Form 700s.

Jean Caramatti stated that she works for the Airport and has filed a Form 700 for 30 years, and is speaking on behalf of herself as a filer. She stated that there are unintended consequences with posting online that must be considered and stated that, for example, a tenant of a City employee does not rent housing thinking that his or her name will be publicly available. She stated there are many reasons a tenant would want to retain their privacy, such as a victim of domestic violence or harassment. She stated that once information is posted online, anyone can search Google and find an individual.

Rebecca Rhine stated that training is an important issue to consider, because filers are subject to fines for misreporting on a Form 700. She stated that departments have no uniform standards to determine which employees are "designated" to file Form 700s. She stated that in at least one department, interns are required to file.

Alex Thomason, representing the International Federation of Professional and Technical Engineers, Local 21, stated that he supports the concerns raised by the MEA. He stated that by posting employee financial information online, it may subject employees whose jobs require them to make determinations imposing fines and fees on members of the public subject to retaliation. He stated that the requirement to file online is a change in the terms of employment and that it is appropriate for the Commission to meet and confer with the various unions regarding this change.

Charles Marsteller stated that Form 700s are a valuable tool to discern the financial interests of employees. He stated that one employee who was fined $15,000 successfully received a waiver of the fine by stating he had no assets, yet his Form 700 revealed he owned two properties.

Marc Solomon stated that technology exists to insulate posted information from appearing in a Google search. He stated that the accountability of City management is important, and any privacy concerns could be addressed by having a "hardship" process. He stated that corruption in the City is already high, and that Form 700s are already public information.

Larry Bush from Friends of Ethics stated that there may be some appropriate circumstances to allow for redacting information such as in the case of battered spouses, but that there should be uniform standards so the decision to redact is not arbitrary. He stated that Form 700 training is online and would not take much staff time to implement training. He stated that the Ethics Commission could coordinate training efforts with other jurisdictions.

Bob Planthold stated that he supports online filing of Form 700s. He stated that online training for Form 700 filers already exists. He stated that there are many employees within departments that make decisions that implicate financial interests so it is appropriate that they file Form 700s.

He stated that a common database would make it much simpler for the public to uncover that information rather than have to make multiple requests to various City departments.

Responding to Commissioner Hayon, DCA Shen stated that departments determine which employees must file a From 700, and that the City Attorney's Office asks each department to review that status every two years.

Commissioner Hayon stated that it might be appropriate to conduct periodic audits to determine which employees should be filing.

Responding to a question from Commission Hayon regarding protecting information from being searchable on Google, Information Technology Officer Massey stated that doing so is possible, but that the information would be just as easily searchable through the Ethics Commission's own database.

Both Commissioner Andrews and Commissioner Hur expressed concerns regarding the departmental process of determining which employees should file Form 700s, but that having the information online in a central database is useful to the public. Commissioner Hur stated that staff should engage in a meet and confer with the unions before the Commission moves forward.

IV. Discussion and possible action on Commissioner Keane's proposal to place on the November 3, 2015 ballot a measure regulating expenditure lobbyists.

Commissioner Keane introduced the item and explained the background that led to the proposed changes of the Lobbyist Ordinance. He stated that after conducting an interested persons meeting, and considering the suggestions of the Commission at the last meeting, the current draft includes a provision that any change to the Ordinance has to advance the purpose of the Ordinance and requires a super majority vote by the Board of Supervisors plus a vote by four of the five Ethics Commissioners along with findings on how the change advances the purpose of the Ordinance. He stated that money is spent on outreach activity by entities to influence government which is currently not captured under the Lobbyist Ordinance. He stated that this is a modest measure and urged the Commission to vote to include this as a ballot measure for the November 2015 election.

Responding to a question by Chair Renne regarding the regulations on political contributions and gift limits, DCA Shen stated that, as drafted, expenditure lobbyists would be subject to the same rules as contact lobbyists.

Commissioner Hur stated that the requirement proposed in section 2.103(a) to include "specifics to substantiate" and findings that any future amendment furthers the purpose of the Ordinance is more restrictive than the corresponding provision in the Campaign Finance Reform Ordinance and asked Commissioner Keane why it was included.

Commissioner Keane stated that the additional language was added out of concerns expressed by the Civil Grand Jury and the Friends of Ethics that the Board of Supervisors could just make a "boilerplate" statement that an amendment furthers the purpose of the act but in reality reduces disclosure or oversight. He stated that the Board of Supervisors is a political body and that the Ethics Commission is not, and that the Ethics Commission should ensure that the Board of Supervisors could not make a change that guts the Ordinance.

Commissioner Hur stated that any change also requires approval by four out of the five Ethics Commission members, which inherently provides a check on any proposed change put forward by the Board of Supervisors, so the added requirement to include findings on how any proposed change furthers the Ordinance is not necessary and he stated that he would like that stricken from the language.

Commissioner Hur stated that the proposed definition of "expenditure lobbyist" in section 2.105 includes any person "who makes payments totaling $2,500 or more in a calendar month to solicit, request, or urge, directly or indirectly, other persons to communicate directly with an officer of the City and County in order to influence local legislative or administrative action" and asked Commissioner Keane to clarify what "indirectly" referred to.

Commissioner Keane clarified that "indirectly" refers to the person who is paying to urge someone to communicate to the official, regardless of how remote.

Commissioner Hur suggested that the definition would express that intent more clearly if it read "who *directly or indirectly* makes payments totaling $2,500 or more in a calendar month to solicit, request, or urge, other persons to communicate directly with an officer of the City and County in order to influence local legislative or administrative action."

Commissioner Hur stated that the examples provided in the definition of "expenditure lobbyist" are vague. He stated, for example, citing activities that count toward the threshold amount such as public relations, advertising, public outreach research are potentially harmful. He posited that if an individual conduct research on an issue to determine if that individual wants to engage in lobbying, would that expenditure qualify that person as an expenditure lobbyist even if he or she has not made any communication to encourage others to communicate with an elected official.

Commissioner Keane stated that, yes, if an individual spends money commissioning others to engage in research with the ultimate goal toward influencing a City decision than that is an example of expenditure lobbying.

Commissioner Hur stated that there must be some nexus between the research and the efforts to communicate with the official. He stated that it is possible that some research is conducted for another purpose, but is then later used for the purpose of lobbying. He suggested that the disclosure occur at the time of the communication with the public official so long as there is a connection that ties the original research to the communication.

Commissioner Hur stated that the proposed disclosure requirements for activity expenses contained in section 2.110 are not sufficiently inclusive. He stated that the way it is drafted, an expenditure lobbyist may be able to give a gift to an official without being required to report it as an activity expense because an expenditure lobbyist does not make a direct contact with the official.

DCA Shen suggested several options to the Commission to address the gift issue Commissioner Hur raised, including removing the provision from the draft.

Commissioner Hur stated that there is no guidance as to when an employer may be required to file as an expenditure lobbyist. He cited as an example the situation where a government affairs

employee of a company registers and reports as an expenditure lobbyist and spends a percentage of her or her time engaged in expenditure lobbying within the City. He then posed the question of whether the employer also becomes an expenditure lobbyist through the employee's activity.

Commissioner Keane stated that the Commission could clarify any ambiguities through regulations if the proposed ballot measure passes.

Vice-Chair Andrews stated that he is concerned that non-profits are not exempted by these amendments, considering that the Ordinance already exempts non-profits with respect to contact lobbyists. He stated that these amendments could capture non-profits who hold a series of community town hall meetings on an issue and provide food for attendees if the cost of the food meets the threshold amount. He stated that it would be easy for a private company to avoid having to register as an expenditure lobbyist by ensuring they spend just under the $2,500 monthly threshold amount.

Commissioner Keane stated that non-profits should not be exempt and that it was not onerous to mandate the same requirements on non-profits as other entities. He stated that the public has the right to know when non-profits engage with the City to affect policy.

Commissioner Hayon stated that she is concerned about regulating activity defined as expenditure lobbying in these amendments because that type of activity is how most citizen groups engage with the City. She stated that regulating contact lobbying is different because it sheds light on meetings that occur out of the public view, whereas this type of engagement occurs in the full light of the public. She also stated that she did not see the need to rush these amendments in order to put them on this November's ballot as a ballot measure. She stated that she is concerned that these amendments may discourage non-profits from engaging in the civic process.

Commissioner Keane stated that any group, non-profit or otherwise, which attempts to influence public policy should be transparent about its activities. He stated that this is similar to regulations already in place in other jurisdictions.

Commissioner Keane stated that he would make a motion for the Commission to put forward the proposed changes to the Lobbyist Ordinance as a ballot measure inclusive of Commissioner Hur's friendly amendments.

DCA Shen clarified that there were four friendly amendments: 1) to remove the language in section 2.103 regarding the requirement that the Board of Supervisors provide specifics to substantiate findings in order to amend the Ordinance; 2) to move the language "directly or indirectly" in the definition of expenditure lobbyist; 3) to remove the language regarding activity expenses; and 4) to create a nexus between the expenditures and the communications.

Public Comment:
Larry Bush stated that if the language requiring the Board of Supervisors provide specifics to substantiate findings in order to amend the Ordinance is removed the ballot measure will not pass. He stated that these changes are an attempt to remedy changes that a prior Commission removed from the Ordinance without discussion. He stated that the Board of Supervisors already gutted the Ordinance.

Bob Planthold stated that he advocates to move the draft legislation to the ballot as is. He stated that this merely returns the law to what is was prior to the 2010 changes. He stated that a big developer could set up an astroturf group and these changes will regulate that.

Marc Solomon urged the Commission to put this on the ballot so voters can decide. He stated that the requirement to state findings for future changes is important so residents have recourse if things are done improperly. He stated that exempting non-profits just encourages entities to form astroturf groups. He stated these amendments need to go on the ballot for this November because this activity is on the rise.

Charles Marsteller stated that Bob Planthold was a former Ethics Commission Chair and that his expertise prevails because this law was in effect when he was on the Commission. He stated that if there is a concern about grass roots type efforts being affected by the law, the dollar threshold could be raised. He stated that if this doesn't go to the voters and instead is sent to the Board of Supervisors to approve, the legislation will be fundamentally changed because the Board is a political body.

Patrick Monette-Shaw stated that he supports the motion but would prefer if some of the friendly amendments had not been included. He stated that San Francisco is an outlier and needs to be like other jurisdictions that regulate expenditure lobbying. He stated that the Health Commission overturned the will of the voters by neutering Proposition Q with no findings to support the change in the law.

Bob Dockendorf stated that he supported the proposed legislation. He stated that the Ethics Commission has a perennial problem in asserting its authority. He stated that non-profits must be included because any group can form as a non-profit.

John St. Claire stated that he has been a resident of San Francisco since 1986 and is very concerned about the influence of money in politics.

Sue Hestor stated that the political landscape was changed by Citizen's United. She stated that entities can hide expenditures and impose their will in the United States and that this must not happen in San Francisco. She stated that if you listen to the radio, you would think that puppies are being helped when a non-disclosed interest states in an ad that they can stay in the City because they can host visitors, when in reality it decimates the City's rental stock.

Anita Mayo stated that most lobbying in San Francisco occurs through contact lobbying. She stated that expenditure lobbying was eliminated because very few entities qualified. She stated that this current draft is an improvement on what was previously submitted and is more like other jurisdictions. She stated that there may be an issue with developers who must already report if they meet certain thresholds also qualifying as expenditure lobbyists and who would be required to double report their activity.

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Sharyn Saslafsky supported putting the legislation on the November ballot.

Commissioner Hur suggested limiting the corporate officer requirement to CEO, CFO, and Secretary, as well as the person who authorized the expenditure. Commissioner Keane accepted that suggestion as an additional friendly amendment.

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V. Discussion and possible action regarding Commission responses to the 2014-2015 Civil Grand Jury report, "San Francisco's Whistleblower Protection Ordinance is in Need of Change."

Executive Director St. Croix introduced the item and explained the Civil Grand Jury process for responses.

Public Comment:
Dr. Derek Kerr stated that he was a whistleblower and was dismissed in 2010. He stated that since 1995 the Ethics Commission has not substantiated any retaliation claim. He stated that the international rate for the sustaining of retaliation claims is ten percent. He stated that it suggests that the Ethics Commission is complicit with the City and views whistleblowers as threats. He stated that the Ethics Commission staff is afraid to substantiate claims because it would face layoffs and budget cuts.

The following written summary was provided by the speaker, Dr. Derek Kerr, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:

> Records show that since June 1995, some 60 retaliation claims passed through the Ethics Commission. In 20 years, none has been sustained. This startling statistic suggests that Ethics has been complicit in the repression of employees who break ranks to serve the public interest. Whistleblower claims are D.O.A. because whistleblowers are viewed as threats - not assets. Your investigations are superficial, aimed at exonerating respondents. Instead of independence you submit to City Attorneys whose duty is to defend City officials accused of wrongdoing. Your staff is afraid to substantiate retaliation claims because they'd face budget cuts and layoffs. They'd be treated just like whistleblowers. Nonetheless, please start by implementing the Civil Grand Jury recommendations. Beyond that, whistleblowers should be viewed as potential assets rather than potential liabilities. Until then, they should raise their concerns publicly via the media and the courts.

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Elena Schmid stated that she was on a former Civil Grand Jury and was glad that this Grand Jury decided to address the Whistleblower Ordinance. She stated that she appreciated staff's response which are positive, but vague. She stated that the steps to address the recommendations should be better articulated.

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Derek Kerr stated that the response is vague and it would be reassuring for the Commission to form a sub-committee on this issue.

Motion 150629-02 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission approve the responses to the Civil Grand Jury report.

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a) Ethics Complaint No. 10-150331, hearing regarding alleged violation of the Sunshine Ordinance.
Complainant: Dominic Maionchi
Respondent: Phil Ginsburg

DCA Shen left the well and DCA White arrived to advise the Commission on this item.

Chair Renne introduced the item and noted that the Complainant was not present but was informed of the hearing.

Eric Pawlowsky, representing Phil Ginsburg, stated that he urged the Commission to adopt the recommendation issued by staff. He stated that the department followed the advice of the City Attorney's Office to protect residents' privacy.

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Patrick Monette-Shaw stated that he was disturbed to see a different recommendation than what was issued for a case involving John Rahaim. He stated that the Good Government Guide has no legal weight. He stated that department heads are responsible for the actions of their staff. He urged that the Commission find the Mr. Ginsburg committed a violation of the Sunshine Ordinance.

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Commission Andrews stated that the waitlist did not create a contract for a boat slip, and that once a contract was entered into, the address information would then be public.

Motion 150629-03 (Andrews/Hayon): Moved, seconded, and passed (4-1, Keane dissenting) that the Commission find that Phil Ginsburg did not commit a violation of the Sunshine Ordinance.

VII. Discussion and possible action on Executive Director recruitment process.

Deputy Executive Director Mainardi and DCA White both left the well for this item. DCA Shen returned to the well to advise the Commission on this item.

Chair Renne introduced the item and stated that the Commission must approve the authorization to hire Alliance to conduct the recruitment search.

Motion 150629-04 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission authorize Alliance Resource Consulting to conduct the recruitment search for the Commission's Executive Director.

Public Comment:
None

Chair Renne stated that Alliance was informed that the job description is insufficient and that he and Vice-Chair Andrews will hold an interested persons meeting on July 9, 2015, to solicit input on the job description. He stated that Alliance will do the initial sort of applicants, then he and Vice-Chair Andrews will narrow down the candidates and bring the best qualified applications to the Commission for consideration.

Vice-Chair Andrews stated that he conducted group meetings with Commission staff and received excellent feedback and insight into the Executive Director's role as a manager. He stated he will provide a memo to Chair Renne summarizing his findings. He thanked the Commission staff for its cooperation.

VIII. Discussion and possible action regarding complaints received or initiated by the Ethics Commission concerning: (1) San Francisco Campaign and Governmental Conduct Code sections 1.122(b)(1) (improper use of campaign funds); and (2) San Francisco Campaign and Governmental Conduct Code section 2.110(c) (failure to report lobbying contacts). Closed Session.

Motion 150629-05 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission go into closed session.

Public Comment:
None

The Commission went into closed session at 8:55 P.M. All commission members, Executive Director St. Croix, Deputy Executive Director Mainardi, DCA White, staff member Argumedo, and staff member Chatfield remained in the hearing room. DCA Shen and all members of the public left the hearing room. The Commission returned from closed session at 9:22 P.M. DCA Shen did not return to the hearing room. No members of the public returned to the hearing room.

Motion 150629-06 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission keep its closed session deliberations confidential.

Public Comment:
None

IX. Discussion and possible action on the Commission's May 27 and June 5, 2015 draft meeting minutes.

Motion 150629-07 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission approve the Commission's May 27 and June 5, 2015, meeting minutes.

Public Comment:
None

X. Discussion of Executive Director's Report.

Executive Director St. Croix stated that the Commission received no add-backs to the budget and that two candidates have qualified for public financing.

Responding to Commissioner Keane, Executive Director St. Croix stated that the Commission had asked for funding for three additional positions which was not granted, and that no add-backs were granted to other similarly-sized departments.

Executive Director St. Croix stated that this meeting is his last meeting and thanked the Commission for allowing him to serve.

Chair Renne thanked Executive Director St. Croix for his service and his work.

Commissioner Hur thanked Executive Director St. Croix for his work and stated that the job of Executive Director is challenging and that Mr. St. Croix did it well. He stated that he appreciated Mr. St. Croix's devotion to the Commission.

Commission Hayon also thanked Executive Director St. Croix for his service and his work

Vice-Chair Andrews thanked Executive Director St. Croix for his service and credited him with creating a great staff culture and good work environment. He stated that staff had given Mr. St. Croix high marks for his leadership.

Commissioner Keane wished Executive Director St. Croix good luck in the future.

Public Comment:
None

XI. Items for future meetings.

Commissioner Hur stated that he will work on proposing changes to the Whistleblower Ordinance.

Commissioner Andrews stated he would like to address the utility of the complaint log. Deputy Executive Director Mainardi stated that staff has already started to revise how it monitors complaints.

Public Comment:
None

XII. Adjournment.

Motion 150629-08 (Keane/Hayon): Moved, seconded, and passed (5-0) that the Commission adjourn.

Public Comment:
None

The meeting adjourned at 9:35 P.M.

Minutes of the Special Meeting of
The San Francisco Ethics Commission
June 29, 2015
Room 400 City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

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I. Call to order and roll call.

Chairperson Renne called the meeting to order at 5:30 PM.

COMMISSION MEMBERS PRESENT: Paul Renne, Chairperson; Brett Andrews, Vice-Chairperson; Beverly Hayon, Commissioner; Ben Hur, Commissioner; Peter Keane; Commissioner.

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst; Catherine Argumedo, Investigator/Legal Analyst; Steven Massey, Information Technology Officer; Pat Petersen, Training Officer.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA), Andrew Shen, DCA.

OTHERS PRESENT: Patrick Monette-Shaw; Rebecca Rhine; Jean Caramatti; Alex Thomason; Charles Marsteller; Marc Solomon; Larry Bush; Bob Planthold; Bob Dockendorf; John St. Claire; Sue Hestor; Anita Mayo; Elli Abdoli; Chris Wright; Sharyn Saslafsky; Derek Kerr; Elena Schmid; Eric Pawlowsky; and other unidentified members of the public.

MATERIALS DISTRIBUTED:

- Staff Memorandum to Ethics Commission members, dated June 24, 2015, re: Adoption of Proposed Regulations Implementing Electronic Filing of Statements of Economic Interests for All City Employees;
- Legislative Digest on Initiative Ordinance, Campaign and Governmental Conduct Code, Expenditure Lobbyists;
- Initiative Ordinance, Campaign and Governmental Conduct Code, Expenditure Lobbyists;
- Summary of Interested Persons Meeting held on June 10, 2105;
- Proposed Ethics Commission Response to Civil Grand Jury Report "San Francisco's Whistleblower Protection Ordinance is in Need of Change;"
- Civil Grand Jury Report "San Francisco's Whistleblower Protection Ordinance is in Need of Change" dated May 2015;
- Staff Memorandum to Ethics Commission members regarding Hearing on Ethics Complaint 10-150331, Report and Recommendation on Ethics Complaint 10-150331 and attachments;
- Alliance Resource Consulting LLC Proposal for Executive Director Recruitment Search;
- Draft Minutes of the Special Meeting of the San Francisco Ethics Commission of May 27, 2015;
- Draft Minutes of the Special Meeting of the San Francisco Ethics Commission of June 5, 2015;

- Executive Director's Report.

II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.

Patrick Monette-Shaw stated that the Ethics Commission received two conflict of interest complaints against San Francisco Retirement Board member Wendy Paskin-Jordan. He stated that most people believe that he filed those complaints even though he did not. He stated that Ms. Paskin-Jordan admitted on a Youtube video to aggregating funds with her firm to reach the 10 million dollar threshold. He stated that the Ethics Commission must investigate.

Rebecca Rhine stated that she represents the Municipal Executives Association (MEA). She stated that MEA members have expressed privacy concerns regarding the Commission's consideration of posting online all Statement of Economic Interests Form 700s.

III. Discussion regarding draft regulations for electronic filing and website posting of Statements of Economic Interests (FPPC Form 700).

Deputy Executive Director Mainardi introduced the item and explained what it means to be a "designated" employee subject to the requirements to file a Statement of Economic Interests Form 700. He stated that Form 700s filed by designated employees who are not elected, appointed, or a department head, are currently filed with each department. He stated that the proposed amendments would mandate that designated employees file their Form 700s electronically with the Ethics Commission.

Responding to Chair Renne, Deputy Executive Director Mainardi stated that elected and appointed officials and department heads must file with the Ethics Commission by law, and that this change would create a central database for all Form 700s filers, including those filed by designated employees. Deputy Executive Director Mainardi also stated that the online copies of Form 700s will be redacted to protect addresses, phone numbers, and the names of sources of rental income, but that the hard copies would not be redacted and would be available upon request.

DCA Shen stated that most designated employees who file a Form 700 are not required to attend ethics trainings like elected and appointed officials and department heads must do, and that the proposed regulations do not institute a training requirement.

Vice-Chair Andrews stated that training should be provided if employees are going to be held accountable for the information provided on a Form 700.

Deputy Executive Director Mainardi stated that the proposed regulations do not change who has to file, which is determined at the departmental level, only that those employees who already file with their department must now file online.

Responding to a question by Commissioner Hur expressing concern that an employee could be easily harassed if financial information is readily available online, Deputy Executive Director Mainardi stated that an employee could submit a request to have the Form 700 removed from the online database, and if granted, that the approved request would be reported to the Commission.

Chair Renne stated that anyone could, right now, go to a department and retrieve an unreacted copy of a filer's Form 700.

Public Comment:
Patrick Monette-Shaw stated that Form 700s are public documents and currently available to any member of the public, so concerns regarding employee privacy are moot. He stated that concerns about the lack of training are "nonsense" because training on Form 700 filing is available online and can be viewed while at work. He stated that contractors with the City should also be required to file Form 700s.

Jean Caramatti stated that she works for the Airport and has filed a Form 700 for 30 years, and is speaking on behalf of herself as a filer. She stated that there are unintended consequences with posting online that must be considered and stated that, for example, a tenant of a City employee does not rent housing thinking that his or her name will be publicly available. She stated there are many reasons a tenant would want to retain their privacy, such as a victim of domestic violence or harassment. She stated that once information is posted online, anyone can search Google and find an individual.

Rebecca Rhine stated that training is an important issue to consider, because filers are subject to fines for misreporting on a Form 700. She stated that departments have no uniform standards to determine which employees are "designated" to file Form 700s. She stated that in at least one department, interns are required to file.

Alex Thomason, representing the International Federation of Professional and Technical Engineers, Local 21, stated that he supports the concerns raised by the MEA. He stated that posting employee financial information online may subject employees, whose jobs require them to make determinations imposing fines and fees on members of the public, subject to retaliation. He stated that the requirement to file online is a change in the terms of employment and that it is appropriate for the Commission to meet and confer with the various unions regarding this change.

Charles Marsteller stated that Form 700s are a valuable tool to discern the financial interests of employees. He stated that one employee who was fined $15,000 successfully received a waiver of the fine by stating that he had no assets, yet his Form 700 revealed he owned two properties.

Marc Solomon stated that technology exists to insulate posted information from appearing in a Google search. He stated that accountability of City management is important, and any privacy concerns could be addressed by having a "hardship" process. He stated that corruption in the City is already high, and that Form 700s are already public information.

Larry Bush from Friends of Ethics stated that there may be some appropriate circumstances to allow for redacting information such as in the case of battered spouses, but that there should be uniform standards so the decision to redact is not arbitrary. He stated that Form 700 training is online and would not take much staff time to implement training. He stated that the Ethics Commission could coordinate training efforts with other jurisdictions.

Bob Planthold stated that he supports online filing of Form 700s. He stated that online training for Form 700 filers already exists. He stated that there are many employees within departments that make decisions that implicate financial interests so it is appropriate that they file Form 700s.

He stated that a common database would make it much simpler for the public to uncover that information rather than have to make multiple requests to various City departments.

Responding to Commissioner Hayon, DCA Shen stated that departments determine which employees must file a From 700, and that the City Attorney's Office asks each department to review that status every two years.

Commissioner Hayon stated that it might be appropriate to conduct periodic audits to determine which employees should be filing.

Responding to a question from Commission Hayon regarding protecting information from being searchable on Google, Information Technology Officer Massey stated that doing so is possible, but that the information would be just as easily searchable through the Ethics Commission's own database.

Both Vice-Chair Andrews and Commissioner Hur expressed concerns regarding the departmental process of determining which employees should file Form 700s, but that having the information online in a central database is useful to the public. Commissioner Hur stated that staff should engage in a meet and confer with the unions before the Commission moves forward.

IV. Discussion and possible action on Commissioner Keane's proposal to place on the November 3, 2015 ballot a measure regulating expenditure lobbyists.

Commissioner Keane introduced the item and explained the background that led to the proposed changes to the Lobbyist Ordinance. He stated that after conducting an interested persons meeting, and considering the suggestions of the Commission at the last meeting, the current draft includes a provision that any change to the Ordinance has to advance the purpose of the Ordinance and requires a super-majority vote by the Board of Supervisors plus a vote by four of the five Ethics Commissioners along with findings on how the change advances the purpose of the Ordinance. He stated that money is spent on outreach activity by entities to influence government which is currently not captured under the Lobbyist Ordinance. He stated that this is a modest measure and urged the Commission to vote to include this as a ballot measure for the November 2015 election.

Responding to a question by Chair Renne regarding the regulations on political contributions and gift limits, DCA Shen stated that, as drafted, expenditure lobbyists would be subject to the same rules as contact lobbyists.

Commissioner Hur stated that the requirement proposed in section 2.103(a) to include "specifics to substantiate" and findings that any future amendment furthers the purpose of the Ordinance is more restrictive than the corresponding provision in the Campaign Finance Reform Ordinance and asked Commissioner Keane why it was included.

Commissioner Keane stated that the additional language was added out of concerns expressed by the Civil Grand Jury and the Friends of Ethics that the Board of Supervisors could just make a "boilerplate" statement that an amendment furthers the purpose of the ordinance but actually reduces disclosure or oversight. He stated that the Board of Supervisors is a political body and that the Ethics Commission is not, and that the Ethics Commission should ensure that the Board of Supervisors could not make a change that guts the Ordinance.

Commissioner Hur stated that any change also requires approval by four out of the five Ethics Commission members, which inherently provides a check on any proposed change put forward by the Board of Supervisors, so the added requirement to include findings on how any proposed change furthers the Ordinance is not necessary and he stated that he would like that stricken from the language.

Commissioner Hur stated that the proposed definition of "expenditure lobbyist" in section 2.105 includes any person "who makes payments totaling $2,500 or more in a calendar month to solicit, request, or urge, directly or indirectly, other persons to communicate directly with an officer of the City and County in order to influence local legislative or administrative action" and asked Commissioner Keane to clarify what "indirectly" referred to.

Commissioner Keane clarified that "indirectly" refers to the person who is paying to urge someone to communicate to the official, regardless of how remote.

Commissioner Hur suggested that the definition would express that intent more clearly if it read "who *directly or indirectly* makes payments totaling $2,500 or more in a calendar month to solicit, request, or urge, other persons to communicate directly with an officer of the City and County in order to influence local legislative or administrative action."

Commissioner Hur stated that the examples provided in the definition of "expenditure lobbyist" are vague. He stated, for example, citing activities that count toward the threshold amount such as public relations, advertising, public outreach research are potentially harmful. He posited that if an individual conduct research on an issue to determine if that individual wants to engage in lobbying, would that expenditure qualify that person as an expenditure lobbyist even if he or she has not made any communication to encourage others to communicate with an elected official.

Commissioner Keane stated that if an individual spends money commissioning others to engage in research with the ultimate goal toward influencing a City decision then that is an example of expenditure lobbying.

Commissioner Hur stated that there must be some nexus between the research and the efforts to communicate with the official. He stated that it is possible that some research is conducted for another purpose, but is then later used for the purpose of lobbying. He suggested that the disclosure occur at the time of the communication with the public official so long as there is a connection that ties the original research to the communication.

Commissioner Hur stated that the proposed disclosure requirements for activity expenses contained in section 2.110 are not sufficiently inclusive. He stated that the way it is drafted, an expenditure lobbyist may be able to give a gift to an official without being required to report it as an activity expense because an expenditure lobbyist does not make a direct contact with the official.

DCA Shen suggested several options to the Commission to address the gift issue Commissioner Hur raised, including removing the provision from the draft.

Commissioner Hur stated that there is no guidance as to when an employer may be required to file as an expenditure lobbyist. He cited as an example the situation where a government affairs

employee of a company registers and reports as an expenditure lobbyist and spends a percentage of her or her time engaged in expenditure lobbying within the City. He then posed the question of whether the employer also becomes an expenditure lobbyist through the employee's activity.

Commissioner Keane stated that the Commission could clarify any ambiguities through regulations if the proposed ballot measure passes.

Vice-Chair Andrews stated that he is concerned that non-profits are not exempted by these amendments, considering that the Ordinance already exempts non-profits with respect to contact lobbyists. He stated that these amendments could capture non-profits who hold a series of community town hall meetings on an issue and provide food for attendees if the cost of the food meets the threshold amount. He stated that it would be easy for a private company to avoid having to register as an expenditure lobbyist by ensuring they spend just under the $2,500 monthly threshold amount.

Commissioner Keane stated that non-profits should not be exempt and that it was not onerous to mandate the same requirements on non-profits as other entities. He stated that the public has the right to know when non-profits engage with the City to affect policy.

Commissioner Hayon stated that she is concerned about regulating activity defined as expenditure lobbying in these amendments because that type of activity is how most citizen groups engage with the City. She stated that regulating contact lobbying is different because it sheds light on meetings that occur out of the public view, whereas this type of engagement occurs in the full light of the public. She also stated that she did not see the need to rush these amendments in order to put them on this November's ballot as a ballot measure. She stated that she is concerned that these amendments may discourage non-profits from engaging in the civic process.

Commissioner Keane stated that any group, non-profit or otherwise, which attempts to influence public policy should be transparent about its activities. He stated that this is similar to regulations already in place in other jurisdictions.

Commissioner Keane stated that he would make a motion for the Commission to put forward the proposed changes to the Lobbyist Ordinance as a ballot measure inclusive of Commissioner Hur's friendly amendments.

DCA Shen clarified that there were four friendly amendments: 1) to remove the language in section 2.103 regarding the requirement that the Board of Supervisors provide specifics to substantiate findings in order to amend the Ordinance; 2) to move the language "directly or indirectly" in the definition of expenditure lobbyist; 3) to remove the language regarding activity expenses; and 4) to create a nexus between the expenditures and the communications.

Public Comment:
Larry Bush stated that if the language requiring the Board of Supervisors to provide specifics to substantiate findings in order to amend the Ordinance is removed the ballot measure will not pass. He stated that these changes are an attempt to remedy changes that a prior Commission removed from the Ordinance without discussion. He stated that the Board of Supervisors has already gutted the Ordinance.

Bob Planthold stated that he advocates to move the draft legislation to the ballot as is. He stated that this merely returns the law to what is was prior to the 2010 changes. He stated that a big developer could set up an astroturf group and that these changes will regulate that.

Marc Solomon urged the Commission to put this on the ballot so voters can decide. He stated that the requirement to state findings for future changes is important so residents have recourse if things are done improperly. He stated that exempting non-profits just encourages entities to form astroturf groups. He stated these amendments need to go on the ballot for this November because this activity is on the rise.

Charles Marsteller stated that Bob Planthold is a former Ethics Commission Chair and that his expertise prevails because this law was in effect when he was on the Commission. He stated that if there is a concern about grass-roots type efforts being affected by the law, the dollar threshold could be raised. He stated that if this doesn't go to the voters and instead is sent to the Board of Supervisors to approve, the legislation will be fundamentally changed because the Board is a political body.

Patrick Monette-Shaw stated that he supports the motion but would prefer if some of the friendly amendments had not been included. He stated that San Francisco is an outlier and needs to be like other jurisdictions that regulate expenditure lobbying. He stated that the Health Commission overturned the will of the voters by neutering Proposition Q with no findings to support the change in the law.

Bob Dockendorf stated that he supported the proposed legislation. He stated that the Ethics Commission has a perennial problem in asserting its authority. He stated that non-profits must be included because any group can form as a non-profit.

John St. Claire stated that he has been a resident of San Francisco since 1986 and is very concerned about the influence of money in politics.

Sue Hestor stated that the political landscape was changed by the Citizens United decision. She stated that entities can hide expenditures and impose their will in the United States and that this must not happen in San Francisco. She stated that if you listen to the radio, you would think that puppies are being helped when a non-disclosed interest states in an ad that they can stay in the City because they can host visitors, when in reality it decimates the City's rental housing stock.

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Commissioner Hur suggested limiting the corporate officer requirement to CEO, CFO, and Secretary, as well as the person who authorized the expenditure. Commissioner Keane accepted that suggestion as an additional friendly amendment.

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Respondent: Phil Ginsburg

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VII. Discussion and possible action on Executive Director recruitment process.

Deputy Executive Director Mainardi and DCA White both left the well for this item. DCA Shen returned to the well to advise the Commission on this item.

Chair Renne introduced the item and stated that the Commission must approve the authorization to hire Alliance Resource Consulting to conduct the recruitment search.

Motion 150629-04 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission authorize Alliance Resource Consulting to conduct the recruitment search for the Commission's Executive Director.

Public Comment:
None

Chair Renne stated that Alliance was informed that the job description is insufficient and that he and Vice-Chair Andrews will hold an interested persons meeting on July 9, 2015, to solicit input on the job description. He stated that Alliance will do the initial sort of applicants, then he and Vice-Chair Andrews will narrow down the candidates and bring the best qualified applications to the Commission for consideration.

Vice-Chair Andrews stated that he conducted group meetings with Commission staff and received excellent feedback and insight into the Executive Director's role as a manager. He stated that he will provide a memo to Chair Renne summarizing his findings. He thanked the Commission staff for its cooperation.

VIII. Discussion and possible action regarding complaints received or initiated by the Ethics Commission concerning: (1) San Francisco Campaign and Governmental Conduct Code sections 1.122(b)(1) (improper use of campaign funds); and (2) San Francisco Campaign and Governmental Conduct Code section 2.110(c) (failure to report lobbying contacts). Closed Session.

Motion 150629-05 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission go into closed session.

Public Comment:
None

The Commission went into closed session at 8:55 P.M. All commission members, Executive Director St. Croix, Deputy Executive Director Mainardi, DCA White, staff member Argumedo, and staff member Chatfield remained in the hearing room. DCA Shen and all members of the public left the hearing room. The Commission returned from closed session at 9:22 P.M. DCA Shen did not return to the hearing room. No members of the public returned to the hearing room.

Motion 150629-06 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission keep its closed session deliberations confidential.

Public Comment:
None

IX. Discussion and possible action on the Commission's May 27 and June 5, 2015 draft meeting minutes.

Motion 150629-07 (Hayon/Andrews): Moved, seconded, and passed (5-0) that the Commission approve the Commission's May 27 and June 5, 2015, meeting minutes.

Public Comment:
None

X. Discussion of Executive Director's Report.

Executive Director St. Croix stated that the Commission received no add-backs to its budget and that two candidates for Supervisor have qualified for public financing.

Responding to Commissioner Keane, Executive Director St. Croix stated that the Commission had asked for funding for three additional positions which was not granted, and that no add-backs were granted to other similarly-sized departments.

Executive Director St. Croix stated that this meeting is his last meeting and thanked the Commission for allowing him to serve.

Chair Renne thanked Executive Director St. Croix for his service and his work.

Commissioner Hur thanked Executive Director St. Croix for his work and stated that the job of Executive Director is challenging and that Mr. St. Croix did it well. He stated that he appreciated Mr. St. Croix's devotion to the Commission.

Commission Hayon also thanked Executive Director St. Croix for his service and his work

Vice-Chair Andrews thanked Executive Director St. Croix for his service and credited him with creating a great staff culture and good work environment. He stated that staff had given Mr. St. Croix high marks for his leadership.

Commissioner Keane wished Executive Director St. Croix good luck in the future.

Public Comment:
None

XI. Items for future meetings.

Commissioner Hur stated that he will work on proposing changes to the Whistleblower Ordinance.

Commissioner Andrews stated he would like to address the utility of the complaint log. Deputy Executive Director Mainardi stated that staff has already started to revise how it monitors complaints.

Public Comment:
None

XII. Adjournment.

Motion 150629-08 (Keane/Hayon): Moved, seconded, and passed (5-0) that the Commission adjourn.

Public Comment:
None

The meeting adjourned at 9:35 P.M.

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